(1)

FILED

No. 96-96 330 AUG 28 1996

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

OFFICIAL COMMITTEE OF TORT CLAIMANTS,

Petitioner,

—v.—

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, CORNING INCORPORATED, BAXTER INTERNATIONAL INCORPORATED, MINNESOTA MINING AND MANUFACTURING COMPANY, BRISTOL-MYERS SQUIBB COMPANY AND MEDICAL ENGINEERING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARVIN E. FRANKEL
(Counsel of Record)
Kenneth H. Eckstein
Jeffrey S. Trachtman
Kramer, Levin, Naftalis
& Frankel
919 Third Avenue
New York, New York 10022
(212) 715-9100

Attorneys for the Official Committee of Tort Claimants

98 PP

QUESTIONS PRESENTED

1. Whether a district court in which a Chapter 11 bankruptcy case is pending against a tortfeasor debtor corporation is authorized or required to exercise jurisdiction over suits against nondebtor joint tortfeasors on the ground that these suits are "related to" the bankruptcy case under 28 U.S.C. § 1334(b) based upon the right of the nondebtors to pursue claims for contribution against the debtor corporation.

2. Whether 28 U.S.C. § 157(b)(5) empowers a district court in which a Chapter 11 bankruptcy case is pending against a tortfeasor debtor corporation to transfer to itself, from state courts throughout the country, cases pending against alleged joint tortfeasors.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed in the caption, the following parties participated in proceedings in the Sixth Circuit: Heidi Lindsey; Johnson County, Texas, Plaintiffs; Breast Implant Tort Claimants Represented by John O'Quinn; Office of the United States Trustee; California Plaintiffs' Steering Committee, as *amicus curiae*; Official Committee of Unsecured Creditors, as Intervenor.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 3

STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

A. Background: The Breast Implant Claims as Asserted by Plaintiffs 4

B. The Commencement of the Bankruptcy and the Proceedings Below 6

REASONS FOR GRANTING THE WRIT 9

CONCLUSION 23

Page

APPENDICES:

Appendix A: Amended Opinion of the United States Court of Appeals for the Sixth Circuit (June 3, 1996) 1a

Appendix B: Opinion of the District Court (September 12, 1995) 29a

Appendix C: Opinion of the District Court (September 12, 1995) 57a

Appendix D: Order Amending Opinion of the United States Court of Appeals for the Sixth Circuit (June 3, 1996) 65a

TABLE OF AUTHORITIES

Cases: Page

A.H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986) 16, 21-22

Celotex Corp. v. Edwards, 115 S. Ct. 1493 (1995) 14, 15, 16

In re Crazy Eddie Sec. Litig., 104 B.R. 582 (E.D.N.Y. 1989) 16

In re Eagle-Picher Indus., Inc., 963 F.2d 855 (6th Cir. 1992) 16

In re Fedpak Sys., Inc., 80 F.3d 207 (7th Cir. 1996) 9, 12, 15, 16

Feld v. Zale Corp. (In re Zale Corp.), 62 F.3d 746 (5th Cir. 1990) 14

Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324 (10th Cir. 1984) 16

Hopkins v. Dow Corning Corp., 33 F.3d 1116 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 734 (1995) 5

In re Kelton Motors Inc., 121 B.R. 166 (Bankr. D. Vt. 1990) 16

Maritime Elec. Co. v. United Jersey Bank, 959 F.2d 1194 (3d Cir. 1991) 16

Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO, 451 U.S. 77 (1981) 18

O' Malley Lumber Co. v. Lockard (In re Lockard), 884 F.2d 1171 (9th Cir. 1989) 16

Pacor v. Higgins, 743 F.2d 984 (3d Cir. 1984) 9-10, 12, 13, 14, 15, 16

In re Silicone Gel Breast Implants Prods. Liab. Litig. ("In re Silicone"), 887 F. Supp. 1455 (N.D. Ala. 1995) 5, 6

In re Silicone Gel Breast Implants Prods. Liab. Litig., Civ. A. Nos. CV92-P-10000-S, CV94-P-11558-S, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994) 6

Teachers Ins. & Annuity Ass'n v. Butler, 803 F.2d 61 (2d Cir. 1986) 16

Torkelson v. Maggio (In re The Guild & Gallery Plus), 72 F.3d 1171 (3d Cir. 1996) 13-14

In re United States Lines, Inc., 128 B.R. 339 (S.D.N.Y. 1991) 20

Wood v. Wood (In re Wood), 825 F.2d 90 (5th Cir. 1987) 17

Statutes

11 U.S.C. § 105 6

11 U.S.C. § 362(a) 6, 16, 20

28 U.S.C. § 157(b)(5) . . . . . *passim*

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1334(b) . . . . . i, 3, 8, 11

28 U.S.C. § 1334(c) 11

28 U.S.C. § 1339(d) 11

28 U.S.C. § 1367 8

28 U.S.C. § 1407 . . . . . 20-21, 21 n.4

28 U.S.C. § 1411 7

Other Authorities:

Restatement (Second) of Torts § 886A, comment g (1979) 18

Howard C. Buschman III & Sean P. Madden, *The Power and Propriety of Bankruptcy Court Intervention in Actions Between Nondebtors*, 47 Bus. Law. 913 (May 1992) 17

W. Page Keeton et al., *Power and Keeton on the Law of Torts* § 50 (5th ed. 1984) 18

Richard B. Sobol, *Bending the Law. The Story of the Dalkon Shield Bankruptcy* (1991) 21

E. Scott Fruehwald, *The Related to Subject Matter Jurisdiction of Bankruptcy Courts*, 44 Drake L. Rev. 1 (1995) 17

No. 96-___

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

OFFICIAL COMMITTEE OF TORT CLAIMANTS,

Petitioner,

-v.-

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, CORNING INCORPORATED, BAXTER INTERNATIONAL INCORPORATED, MINNESOTA MINING AND MANUFACTURING COMPANY, BRISTOL-MYERS SQUIBB COMPANY, and MEDICAL ENGINEERING CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, the Official Committee of Tort Claimants (the "Committee") of Dow Corning Corporation ("Dow Corning" or the "Debtor"), petitions for a writ of certiorari to review the amended decision of the United States Court of Appeals for the Sixth Circuit issued on June 3, 1996. The Sixth Circuit reversed the holding of the United States District Court for the Eastern District of Michigan that the

district court lacked subject matter jurisdiction under the Bankruptcy Code over thousands of state law tort claims pending against nondebtor corporate defendants in courts across the country. The Sixth Circuit held that these claims came within the "related to" jurisdiction provided to district courts sitting in bankruptcy principally because, if these nondebtor defendants lost their cases, they might pursue contribution claims against the Debtor that the court held conceivably might have an impact on the Debtor's estate.

OPINIONS BELOW

The district court issued two opinions on September 12, 1995 that were the subject of respondents' appeals to the Sixth Circuit: The first, addressing Dow Corning's motion to transfer claims pending against its corporate parents, Dow Chemical Company ("Dow") and Corning Incorporated ("Corning"), is reprinted at 29a-56a. The second opinion, addressing motions by three unrelated defendants, Baxter International Incorporated ("Baxter"), Minnesota Mining & Manufacturing Company ("3M"), and Bristol-Myers Squibb Company and Medical Engineering Corporation (together "Bristol-Myers"), is reprinted at 57a-64a. The district court's decisions are reported, respectively, at 187 B.R. 919 and 187 B.R. 934. The Sixth Circuit reversed the district court in a decision issued on April 9, 1996. The decision, reported at 81 F.3d 635, was withdrawn in favor of an amended opinion issued on June 3, 1996 and reported at 86 F.3d 482. The amended decision is reprinted at 1a-28a; the court's accompanying order is reprinted at 65a-66a.

JURISDICTION

The decision of the Sixth Circuit reversing the decisions of the district court was issued on April 9, 1996. A timely petition for rehearing was filed on April 22, 1996 and denied on June 3, 1996, when the Sixth Circuit issued its amended opinion. This Court has jurisdiction to grant a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Two statutory provisions are principally involved in this case:

28 U.S.C. § 1334(b), which in relevant part grants federal court jurisdiction over claims "related to" a debtor's bankruptcy, reads in full as follows: "Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."

28 U.S.C. § 157(b)(5) provides: "The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending."

STATEMENT OF THE CASE

Petitioner was appointed in Dow Corning's bankruptcy case to represent the interests of thousands of product liability/tort claimants against the Debtor. The Debtor's principal liability consists of billions of dollars of

claims by women suing for diseases and injuries alleged to have been caused by silicone gel breast implants created and marketed by the Debtor and others. The decision of which review is sought sustains a motion to bring thousands of breast implant claims pending against other, nondebtor corporate defendants within the bankruptcy jurisdiction through a "transfer" of those claims to the District Court for the Eastern District of Michigan. The Sixth Circuit's decision represents an unprecedented expansion of bankruptcy jurisdiction and, if allowed to stand, will have a drastic impact on the American tort law system never contemplated, much less intended, by Congress. The decision also conflicts with decisions in at least one other circuit limiting "related to" jurisdiction to actions that may themselves have an impact upon the property of the debtor or the administration of its estate.

A. Background: The Breast Implant Claims as Asserted by Plaintiffs

As asserted against the Debtor and the nondebtor respondents, the thousands of tort claims affected by the decision below may be summarized as follows:[1]

The first breast implant using silicone manufactured by the Debtor was implanted into a woman in 1962 — at a time when the safety of the implanted materials had not even been tested on any animal. Relying for silicone's safety on inadequate research dating from the 1940s and no testing, the Debtor began actively marketing silicone breast implants in 1964, representing to the world that silicone products were

---

[1] The affected claims have not been adjudicated. Hundreds of others have been settled or gone to verdict, involving payments of hundreds of millions of dollars by the Debtor and the nondebtors.

permanent, completely safe, and non-toxic. *See In re Silicone Gel Breast Implants Prods. Liab. Litig.* ("*In re Silicone*"), 887 F. Supp. 1455, 1457-58 (N.D. Ala. 1995) (vacating summary judgment in favor of Dow).

For decades the Debtor and Dow, its parent, continued to represent to the public that silicones were totally inert and stable and thus harmless when implanted into the body, while knowing of and concealing from the public substantial data indicating the contrary. *See id.* at 1457-59; *see also Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1119 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 734 (1995). Research conducted by or under the direction of both the Debtor and Dow, and revealed by their records, demonstrated that silicones let loose in the body migrated via the lymphatic, circulatory, and other systems, and that silicones harmed the livers of test animals, caused skin rashes, and produced other adverse reactions. *See generally In re Silicone*, 887 F. Supp. at 1457-58. In addition, the Debtor failed to disclose evidence that silicones produced dramatic physiological changes in the reproductive and other bodily systems of test animals and that the implants leaked and ruptured at a high rate. *See generally Hopkins*, 33 F.3d at 1119 (affirming jury award of over $7.3 million in compensatory and punitive damages based on evidence that the Debtor "rushed development of the silicone gel implants, failed to adequately test the implants, and ignored knowledge of adverse health consequences associated with the implants").

In March 1994, the Debtor and other defendants entered into a global settlement of breast implant claims against them under which the defendants would have contributed up to $4.25 billion to compensate implant recipients. In September 1994, Judge Sam C. Pointer, Jr., who presides over thousands of federal suits referred to him

by the Judicial Panel on Multidistrict Litigation ("the MDL proceedings"), approved that settlement. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, Civ. A. Nos. CV92-P-10000-S, CV94-P-11558-S, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994).

But the settlement amount proved to be insufficient. More than 14,000 class members elected to opt out of the settlement and to pursue their own suits against the Debtor, while nearly a half million women registered to participate in the settlement — far too many to be compensated fully at the scheduled amounts. On October 7, 1995, Judge Pointer tentatively approved a new offer by certain defendants (not including the Debtor, which had withdrawn from the settlement effort and then filed for Chapter 11 protection) to increase their contributions to a restructured settlement to which plaintiffs' counsel have not agreed. *See In re Silicone Gel Breast Implant Prods. Liab. Litig.*, MDL 926, CV 92-P-10000-S (N.D. Ala. Oct. 7, 1995) (Order No. 26).

B. The Commencement of the Bankruptcy and the Proceedings Below

The Debtor commenced this bankruptcy on May 15, 1995. Though the Debtor at all times affirmed that it was solvent and could meet its liabilities, the volume of pending tort suits against it was stated to be the motivating reason for the bankruptcy filing. Upon filing for Chapter 11 protection, the Debtor had an automatic stay of all the actions under Bankruptcy Code § 362(a). In addition, the Debtor immediately commenced an adversary proceeding seeking a temporary restraining order (denied on May 26, 1995) and then a preliminary injunction under § 105 of the Bankruptcy Code barring opt-out plaintiffs from proceeding to trial against its shareholders Dow and Corning (denied by dismissal of the adversary proceeding on June 8, 1996).

The Debtor then tried again to obtain bankruptcy shelter for its shareholders by moving on June 12, 1995 to transfer to the district court not only the already stayed cases against itself but also those proceeding toward trial against Dow and Corning. The other nondebtor breast implant defendants, also large, highly profitable corporations, moved two days later for transfer of cases pending against them.

The Committee and counsel for many individual plaintiffs opposed all of the transfer motions. Plaintiffs argued the futility of trying to resolve myriad complex questions of "disease causation" in a single trial before a single judge (the claimed purpose of the transfer motions)[2] and the unfairness that would result from global treatment of questions of injury causation as to which each claimant has a personal right to a jury trial under 28 U.S.C. § 1411. In its order dated September 12, 1995 on the Debtor's motion, the district court held that it had jurisdiction only over claims against the Debtor, and granted the Debtor's motion to transfer with respect to such claims. However, the court rejected the Debtor's suggestion that an immediate joint causation trial would be useful, directing instead that the federal opt-out cases against the Debtor *not* be physically transferred and that they remain for pre-trial purposes in the MDL Proceedings before Judge Pointer in Alabama. *See* 45a-48a.

The district court rejected the Debtor's attempt to transfer the claims pending against its parents, holding that such claims are not "related to" the Debtor's bankruptcy and

---

2 This futility is compounded by the fact that a substantial portion of the tort claims against the Debtor and the other defendants are based in whole or part not on disease but on physical injury, pain, and permanent disfigurement caused by the need to "explant" ruptured or leaking implants.

thus not within the jurisdiction conferred by 28 U.S.C. § 1334(b). Because of the remote connection to the Debtor's estate, the court held that there was no federal court jurisdiction over claims against the parents under either § 1334(b) or 28 U.S.C. § 1367 (supplemental jurisdiction). The court added that claims against the nondebtors should be remanded to the state courts if the only basis for removal was alleged "related to" or supplemental jurisdiction. 54a. The motions of the other nondebtors were disposed of in similar fashion in a separate order issued the same day.

The Debtor, its parents, and the three unrelated defendants all took appeals from the September 12 orders of the district court. The court of appeals reversed the central holding of the district court that claims against nondebtor defendants did not come within the "related to" jurisdiction of 28 U.S.C. § 1334(b). The circuit court held that such jurisdiction existed with respect to claims against all of the defendants because of the possibility that such parties might pursue claims for contribution in the Debtor's bankruptcy. *See* 13a-21a.[3]

---

[3] The Sixth Circuit adverted to a second ground for "related to" jurisdiction, but only with respect to claims against Dow and Corning, the Debtor's corporate parents: the potential impact of nondebtor claims on insurance jointly held by the Debtor and its parents. *See* 21a-23a. Since this ground could not be asserted as a basis for "related to" jurisdiction over claims against the non-shareholder nondebtors, a reversal of the Sixth Circuit's judgment as to those parties would follow automatically from a determination by this Court that the prospect of contribution claims does not itself establish such jurisdiction. With respect to claims against the Debtor's corporate parents, we believe the appropriate disposition would then be reversal with a remand to determine whether the addition of the insurance factor is sufficient to establish "related to" jurisdiction over the Dow and Corning claims.

The Sixth Circuit also rejected the petitioner's argument that 28 U.S.C. § 157(b)(5), the statute under which respondents sought a "transfer" of the nondebtor claims, does not speak of or provide for any such transfer. *See* 23a-26a.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision would effect an enormous destructive change in the American tort system. Under the rule of this decision, in any mass tort litigation involving even theoretical contribution claims among independent corporate tortfeasors, the bankruptcy of one defendant could lead to the shutting down of litigation against *all* defendants through the device of a "transfer" of such claims to a single bankruptcy forum. Instead of proceeding toward trial or settlement in appropriate venues, such cases would be effectively frozen pending resolution of the co-defendant's bankruptcy. The harm to the plaintiffs is particularly severe since the bankruptcy court has no authority to impose or implement a resolution of litigation against nondebtor defendants short of trying each claim against them. The effect of the transfer is merely indefinite delay.

It is petitioner's submission that this decision distorts the relevant provisions of the bankruptcy law and violates basic principles allocating tort jurisdiction in our federal system. But whether it is correct or not, the Sixth Circuit's ruling has the kind of massive impact and doctrinal significance that warrants the authoritative attention of this Court on certiorari. The Sixth Circuit's decision also creates a direct conflict with the Third Circuit's decision in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), and diverges from the balanced approach taken by other circuits (including, most recently, the Seventh Circuit in *In re Fedpak Systems, Inc.*, 80 F.3d 207 (7th Cir. 1996)), adhering to the

core principle of *Pacor* that only cases that might themselves affect the estate may be deemed "related to" a debtor's bankruptcy. Finally, whether or not the nondebtor claims are within the outer reaches of the "related to" jurisdiction, § 157(b)(5) was never intended to effect a mass transfer of claims against nondebtors of the type approved by the Sixth Circuit.

1. The decision of the Sixth Circuit would accomplish a wholesale enlargement of the bankruptcy jurisdiction at the expense of state judicial authority and the interests of state litigants in the timely and efficient adjudication of state law claims. This striking redistribution of litigation authority and judicial business is an effect that Congress showed no intention of seeking in the pertinent provisions of the Bankruptcy Code. The decision of which review is sought thus has prospective impact not only on large volumes of cases but on the fundamental division of judicial authority under familiar principles of the federal system.

According to the decision below, a claim is "related to" a debtor's bankruptcy if there is any possibility that the defendant, upon being held liable, may assert a contribution claim against the debtor. The circuit court imposed no requirement that the contribution claim already have been asserted, even on a contingent basis in a pleading. It required no showing that ultimate assertion of the contribution claim is likely: "The claims currently pending against the nondebtors give rise to contingent claims against Dow Corning which unquestionably *could* ripen into fixed claims. The *potential* for Dow Corning's being held liable to the nondebtors in claims for contribution and indemnification, or vice versa, suffices to establish a conceivable impact on the estate in bankruptcy." (20a, emphasis added.)

The massive significance of the Sixth Circuit's expansion of "related to" jurisdiction is patent from the circumstances of the instant case alone as well as the readily discernible broader implications of what has been decreed. Anticipating the position adopted by the court of appeals, the respondents accomplished wholesale removals to federal courts across the country of many of the tort cases they had been defending in state courts. The removals purported, of course, to invoke "related to" jurisdiction. The predictable result was a wholesale shutting down of the state litigations, many of which had been verging on trial. The next step in this scenario, the "transfer" to the Eastern District of Michigan, was a recipe for total paralysis. It had to be obvious to everyone, not least the plaintiffs facing their long-postponed day in court, that the District Court for the Eastern District of Michigan could not possibly try more than a minute fraction, if any, of these thousands of cases the plaintiffs had sought to present to juries in their several states. The result was a defendant's dream and a plaintiff's nightmare on a nationwide scale — long, indefinite postponements for impecunious plaintiffs and comfortable defendants, the ideal posture for negotiation of cheap settlements.

It happens that in this case, following the reversal and remand, the district court concluded it should abstain, mandatorily and in the exercise of its discretion, under 28 U.S.C. § 1334(c). Although the abstention ruling appears to be unappealable, 28 U.S.C. § 1334(d), respondents have nevertheless filed notices of appeal, and the general significance of what the Sixth Circuit has held remains unimpaired in any event. Though respondents have thus far failed in their opposition to abstention in this particular case, the sweeping dimensions of "related to" jurisdiction as defined by the Sixth Circuit may be counted on to serve the visible purpose of both blocking state litigation and

transferring it from the courts in which plaintiffs have exercised their right to proceed.

At a minimum, the logic of the decision of the court of appeals portends the clear and disturbing consequences outlined above. Altering the settled understanding that the bankruptcy of one joint tortfeasor neither absolves the others nor delays proceedings against them, it is now held by the Sixth Circuit that any of such other defendants, all of whom have potential claims for contribution, may employ that prospect or possibility as a means of transferring the cases against them and putting them in the deep freeze of a single court overseeing a bankruptcy, commonly at a far remove from the venues the plaintiffs chose. These unsettling consequences in the growing area of mass tort cases have obvious analogues in other areas of the law. Even for tort claims, the impact is by no means confined to "mass" situations. Any alleged joint tortfeasor of a defendant in Chapter 11 would have, according to the Sixth Circuit, an easy route to long delay in an often distant bankruptcy court. The implications of all this are matters of importance warranting this Court's scrutiny.

2. The decision below conflicts with that of the Third Circuit in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), and diverges significantly from *In re Fedpak Systems, Inc.*, 80 F.3d 207 (7th Cir. 1996), in its expansive approach to what "related to" means.

Pacor embodies a thoughtful and balanced approach to bankruptcy jurisdiction that justifies the decision's wide influence. Pacor, a defendant in a suit arising from an asbestos-related injury, impleaded Johns-Manville, the alleged manufacturer of the asbestos. After Johns-Manville entered bankruptcy, Pacor removed the underlying case to federal bankruptcy court alleging that there was "related to"

jurisdiction because a finding of liability in the underlying suit could support a subsequent indemnity claim by Pacor against the debtor. 743 F.2d at 994. The Third Circuit rejected this argument, holding that even though a judgment in favor of the nondebtor defendant would eliminate the possibility of any claim by Pacor against Johns-Manville, the mere fact that a judgment in the other direction *might* give rise to a subsequent, separate indemnity claim did not satisfy the "related to" requirement. *Id.* at 995. The court contrasted situations in which a judgment against a nondebtor would directly affect the estate because of a pre-existing indemnification agreement or other basis for automatic liability for the estate. *Id.*

Pacor reached this result applying a test that includes, but is not fully expressed in, the language seized upon by the Sixth Circuit and other courts in reading "related to" jurisdiction most expansively: whether a proceeding "could conceivably have any effect on the estate." *Id.* at 994. *Pacor* qualifies that seemingly limitless standard with further language frequently ignored by other courts, including the Sixth Circuit here.

Under *Pacor*, an action is "related to" the debtor's bankruptcy only "if the *outcome* could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively)" or if it would "impact[ ] upon the handling and administration of the bankrupt estate." *Id.* (emphasis added). *Pacor* stressed that "jurisdiction of the bankruptcy courts to hear cases related to bankruptcy is not without limit." *Id.* at 994. "[T]here must be some nexus between the 'related' civil proceeding and the title 11 case" beyond "the mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate." *Id.* The Third Circuit has reaffirmed the *Pacor* approach as recently as this year. *See Torkelsen*

v. Maggio (In re Guild and Gallery Plus), 72 F.3d 1171, 1180-82 (3d Cir. 1996).

Read in its entirety, *Pacor* makes clear that "conceivably" does not mean "anything lawyers can conceive of". By necessity the standard requires some reasonable limitation — a real possibility that the purportedly "related to" action will *itself* materially impact the estate, not that it *might* start a hypothetical multi-step chain reaction that *might* ultimately, indirectly, have such an effect. This implicit limitation is why "a large majority of cases reject the notion that bankruptcy courts have 'related to' jurisdiction over third-party actions." *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 753 (5th Cir. 1995).

This Court recognized in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995), that the question of how to mark the boundaries of "related to" jurisdiction was fostering division in the circuits. The Court cited with approval the Third Circuit's attempt in *Pacor* "to strike an appropriate balance" between Congress's intention to grant broad jurisdiction and the inherently limited nature of the authority vested in bankruptcy courts. *Id.* at 1499 & n.6. The Court expressly agreed with *Pacor* that "a bankruptcy court's 'related to' jurisdiction cannot be limitless." *Id.* at 1498.

While the *Celotex* decision did not expressly adopt the *Pacor* standard, its conclusion that "related to" jurisdiction existed in that case is fully consistent with the *Pacor* approach. *Celotex* concerned a direct and immediate effect on the bankruptcy estate: an attempt by a creditor to execute on a surety bond securing a judgment against the debtor. Execution would immediately have had a "direct and substantial adverse effect" on the debtor because it would have entitled the surety to go after collateral posted by the debtor to secure the bond. *See* 115 S. Ct. at 1500. In the

courts below, respondents in this case focused on language of the bankruptcy court in *Celotex* quoted by this Court indicating that the *degree* of harm to the estate that could be occasioned by the action on the bond was uncertain. *See id.* But it was beyond dispute that *some* impact on the estate would flow from execution on the fully secured bond. And the Court expressly contrasted, as not coming within the "related to" jurisdiction, cases that themselves "have no effect on the debtor." *Id.* at 1499.

Consistent with *Pacor* and *Celotex*, the Seventh Circuit recently expressed a balanced and appropriately limited view of "related to" jurisdiction that diverges from the Sixth Circuit's decision in this case. *In re Fedpak Systems, Inc.*, 80 F.3d 207, 213 (7th Cir. 1996), expressed a "more limited" vision of "related to" jurisdiction, focusing on cases affecting the property of the debtor or otherwise directly affecting the debtor's estate: "We have interpreted 'related to' jurisdiction narrowly 'out of respect for Article III' . . . as well as to prevent the expansion of federal jurisdiction over disputes that are best resolved by the state courts. . . . Additionally, we believe that common sense cautions against an open-ended interpretation of the 'related to' statutory language 'in a universe where everything is related to everything else.'" *Id.* at 214 (citations omitted). In *Fedpak*, the court found no "related to" jurisdiction over a proceeding initiated by the *debtor* to clarify the intellectual property rights of a third party and thus "protect the flow of royalty payments from [that party] to the bankruptcy estate." *Id.* The court noted an absence of evidence that the third party "is so troubled by the ambiguity of the current situation that it will cease making payments to the bankruptcy estate," and thus held that no jurisdiction existed over a proceeding raising potential impacts on the estate that were "at best speculative and hypothetical." *Id.*

Pacor, *Celotex*, and *Fedpak* are all consistent with another line of cases holding that the automatic stay provided under § 362(a) of the Bankruptcy Code applies only to claims against the debtor and is not to be extended, absent extraordinary circumstances, to protect solvent nondebtors from ordinary litigation risks. *See, e.g.*, *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1205 (3d Cir. 1991) (bankruptcy filing "does not bar an action against the principal of a debtor-corporation"); *Teachers Ins. & Annuity Ass'n v. Butler*, 803 F.2d 61, 65 (2d Cir. 1986) ("Chapter 11, unlike Chapter 13, contains no provision to protect non-debtors who are jointly liable on a debt with the debtor"); *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1330 (10th Cir. 1984); *In re Crazy Eddie Sec. Litig.*, 104 B.R. 582, 584 (E.D.N.Y. 1989); *see also In re Kelton Motors, Inc.*, 121 B.R. 166, 192-93 (Bankr. D. Vt. 1990) ("[T]he filing of a bankruptcy petition . . . does not, as a general rule, stop litigation against non-debtors although they are in some way connected with the bankrupt, such as joint tortfeasors . . . and related companies") (collecting cases).

The narrow exception to this rule recognized by some courts is also consistent with the balanced approach of *Pacor*. The automatic stay may be extended, these cases provide, to claims against parties, such as corporate officers and directors, whose interests are so intertwined with those of debtors through common defense obligations and automatic indemnification that suits against them are, effectively, suits against the debtors. *See, e.g., In re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 861 (6th Cir. 1992); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1001-02, 1007 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986). At least one court has declined to adopt this exception. *See O'Malley Lumber Co. v. Lockard (In re Lockard)*, 884 F.2d 1171, 1179 (9th Cir. 1989).

Breaking away from the relatively harmonious principles of the cases treated in the foregoing three or four paragraphs, some courts have recognized virtually limitless "related to" jurisdiction, seizing on the "conceivable" language in *Pacor* and ignoring its holding and its more nuanced formulation of the appropriate test. For example, *Wood v. Wood (In re Wood)*, 825 F.2d 90, 94 (5th Cir. 1987), held that "related to" jurisdiction attaches automatically to all claims involving "joint conduct of the debtor and non-debtor defendants." This approach has garnered cogent scholarly criticism:

> Several courts have erroneously liberalized the Pacor standard by seizing on the "conceivably have any effect" language without referring to the sentence which follows and limits it. For example, one court has declared that "all that is required for the subject matter jurisdictional nexus is that the activity have some conceivable impact on the bankruptcy reorganization or estate." Such reformulations of the Pacor test are taken out of context and ignore Pacor's subsequent language and analysis explaining, modifying and limiting the otherwise extremely broad implication that any conceivable impact upon the bankruptcy case gives rise to related jurisdiction.

Howard C. Buschman III & Sean P. Madden, *The Power and Propriety of Bankruptcy Court Intervention in Actions Between Nondebtors*, 47 Bus. Law. 913, 926-27 (May 1992) (footnotes omitted). *See also* E. Scott Fruehwald, *The Related to Subject Matter Jurisdiction of Bankruptcy Courts*, 44 Drake L. Rev. 1, 30-32 (1995) (similarly

arguing that some courts have read "related to" jurisdiction too broadly).

To understand the extraordinary reach of the Sixth Circuit's holding, it is useful to understand the farfetched nature of the hypothetical contribution claims on which the court principally predicated jurisdiction. No such claim has ever been pursued against the Debtor, although the breast implant litigation has been pending for years and dozens of cases have gone to trial. There is no evidence in the record that any of the non-shareholder nondebtors has ever even *pleaded* such a claim against the Debtor, even in the MDL proceedings, where master pleadings were filed by each party.

To pursue a contribution claim, a nondebtor defendant would have to plead and prove a fact that would destroy its position in the outstanding litigation: that breast implants cause disease and other injuries. *See Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 82 (1981) (proof of joint liability is necessary element of common law contribution claim). *See also* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 50, at 339-40 (5th ed. 1984); Restatement (Second) of Torts § 886A, comment g (1979). The suggestion that any nondebtor defendant would come into the Eastern District of Michigan and attempt to prove that Dow Corning's breast implants or silicone gel caused injury to thousands of women is a flight of advocates' fancy. Dow, the Debtor's parent with the more significant exposure, has pledged not to do so. The Debtor knows that the non-shareholder nondebtors are similarly barred by practicality from pursuing contribution claims, and it has therefore shown no concern about cases proceeding to trial against these parties. The Debtor's failure to endorse the transfer motion made by the non-shareholder nondebtors —

and indeed its failure to assert contribution claims on its own behalf against any other breast implant defendant — highlights the unreality of the assertion that contribution claims will have an impact on the estate.

3. An independent ground for granting the petition is the Sixth Circuit's holding that 28 U.S.C. § 157(b)(5) empowers the district court to order transfer of any "related to" case from anywhere in the country to the district court in the bankruptcy venue. The Sixth Circuit's holding constitutes a plain misreading of the statute that, combined with its expansive reading of "related to" jurisdiction, threatens to undermine the balance struck by Congress in setting forth the powers of courts sitting in bankruptcy.

The starting point for analysis is, of course, the language of § 157(b)(5):

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

The most striking thing about that provision for present purposes is that the word "transfer" is nowhere to be found in it. The meaning of that plain omission for the non-debtors is that they have no basis in law for the transfers they sought.

Section 157(b)(5) is a venue-setting provision for personal injury tort cases *against the debtor*. This becomes clear from the setting of this provision within

§ 157 as a whole, which deals generally with the division of responsibility between the district and bankruptcy courts. Literally, of course, when § 157(b)(5) refers to "personal injury tort and wrongful death claims" without qualification, it could mean such claims against anyone, anywhere. But it obviously does not mean that. It means non-core proceedings triable by the district court, not the bankruptcy court. *See In re United States Lines, Inc.*, 128 B.R. 339, 341 (S.D.N.Y. 1991). What kind of non-core proceedings? Section 157(b)(2)(B) answers this question: "personal injury tort or wrongful death claims *against the estate*" (emphasis added).

The looser conception of § 157(b)(5) has crept into some cases because "transfer" is a perfectly sensible word to apply to the power over cases in which *the debtor* is a defendant. Such cases are automatically *in* the bankruptcy court in the fundamental sense that they are held in place by that court by virtue of the automatic stay imposed by Bankruptcy Code § 362(a). For those cases, the bankruptcy district court is empowered to say whether they may be tried at all so long as the bankruptcy is pending. It is a rational corollary to grant the power to say *where* they may be tried. In that orderly scheme of things, it is suitable to speak of the venue-setting power of the district court as a power of "transfer." But the notion of a wider power over cases between nondebtors is embraced neither by the statutory language nor by the essential scheme of the relevant Code provisions.

As against the sound understanding that § 157(b)(5) refers to claims against a bankrupt estate, the extraordinary power to transfer nondebtor cases from courts throughout the country, both state and federal, is a kind of sweeping authority that would require the most persuasively explicit statutory language. When Congress meant to provide for

transfer only of cases pending in *federal courts*, and then only for purposes of pretrial handling, it created a special multi-judge tribunal for the purpose. 28 U.S.C. § 1407. There is no persuasive suggestion anywhere that Congress intended to grant the headier power the appellants claim — to pluck cases out of state and federal courts everywhere into the bankruptcy jurisdiction — to any single district judge in bankruptcy cases.[4]

The contrary view pressed by respondents and adopted by the Sixth Circuit has its judicial origin and principal support in *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.), *cert denied*, 479 U.S. 876 (1986), which turns out upon close inspection to be strange authority indeed, notably because no transfer of claims against nondebtors — or even claims against the debtor — ultimately was ever authorized or made in that case. It is true that Judge Mehrige ordered transfer there of "related to" cases, but his order to that effect was remanded because the affected parties had not received necessary notice of the proposed transfers. *Id.* at 1015-16. On remand, that notice was never given; the transfers never happened; and the *Robins* reorganization went forward to completion unimpeded. *See* Richard B. Sobol, *Bending the Law: The Story of the Dalkon Shield Bankruptcy* 66 (1991).

---

[4] Indeed, reading this power into § 157(b)(5) threatens to place district courts sitting in bankruptcy on a collision course with judges sitting in MDL proceedings. The MDL system governed by 28 U.S.C. § 1407 serves to streamline and coordinate pretrial proceedings in mass torts and other complex litigations. To allow the bankruptcy of a single defendant in an MDL proceeding to justify wholesale transfer of claims pending against nondebtor codefendants in that proceeding would not only be unprecedented -- it would undermine and disrupt a system that has functioned well for 25 years.

Moreover, the Fourth Circuit's discussion of the transfer issue in *Robins* proceeds entirely upon considerations relating to suits *against the debtor* and does not reason at all about the subject of possible "related" cases against nondebtors. The Fourth Circuit's analysis repeatedly refers to "tort cases against a Chapter 11 debtor" (788 F.2d at 1010); transfer of venue "of a case against the bankrupt to another district" (*id.* at 1011); "personal injury tort claims against a debtor" (*id.*); and so on for several pages. Codefendants are mentioned only in one passing reference (*id.* at 1016), strongly suggesting that the court simply never focused on the question whether § 157(b)(5) was intended to permit transfer of nondebtor claims.

The Sixth Circuit relied heavily on statements in *Robins* that claims against A.H. Robins could not be estimated or a dispute resolution facility established unless all Dalkon Shield claims were physically consolidated in one forum. *See* 25a-26a. But it is undisputed that (1) no cases were ever actually transferred in the Robins bankruptcy and (2) the lack of such a transfer had not a whit of impact on the district court's ability to estimate the value of the Dalkon Shield claims and resolve the bankruptcy by establishing a claims resolution facility. Thus, to the extent the Fourth Circuit in *Robins* spoke in terms that would stretch the boundaries of § 157(b)(5) to achieve a policy goal, it has since become clear that the attainment of that goal is unrelated to any purported need to transfer cases. Estimation and liquidation of pending tort claims are two different things, and only the former need occur in the centralized bankruptcy forum. Even more clearly, it is wholly unnecessary to have claims against *non*debtors transferred.

In short, the correct reading of 28 U.S.C. § 157(b)(5) is a further question of moment adding measurably to the reasons for granting the writ.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

Marvin E. Frankel
(Counsel of Record)
Kenneth H. Eckstein
Jeffrey S. Trachtman
Kramer, Levin, Naftalis & Frankel
919 Third Avenue
New York, New York 10022
(212) 715-9100

Attorneys for the Official Committee
of Tort Claimants

August 1996

APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT.

Nos. 95-2034, 95-2082, 95-2084,
95-2106, and 95-2107.
Argued March 5, 1996.
Decided April 9, 1996.

In re DOW CORNING CORPORATION,

Debtor.

HEIDI LINDSEY, *et al.*: Official Committee
of Tort Claimants, *et al.*,

Plaintiffs-Appellees,

—v.—

O'BRIEN, TANSKI, TANZER AND YOUNG HEALTH
CARE PROVIDERS OF CONNECTICUT, *et al.*,

Defendants,

Dow Corning Corporation; The Dow Chemical Company (95-2034/2107); Corning Inc. (95-2107); Baxter Healthcare Corporation; Baxter International Inc. (95-2082); Minnesota Mining and Manufacturing Co. (95-2084); Bristol-Myers Squibb Co.; Medical Engineering Corporation (95-2106),

Defendants-Appellants.

Before:

MARTIN and BATCHELDER, *Circuit Judges*
WISEMAN, *District Judge.**

AMENDED OPINION

BOYCE MARTIN, JR., *Circuit Judge.*

This is an appeal to determine the subject matter jurisdiction of federal district courts, sitting as bankruptcy courts, over proceedings "related to" a case filed under Chapter 11 of the Bankruptcy Code, and the ability of federal district courts to transfer such proceedings to the district court in which the bankruptcy case is pending. The principal issue presented is whether the district court erred, as a matter of law, in its determination that claims for compensatory and punitive damages asserted in tens of thousands of actions against numerous nondebtor manufacturers and suppliers of silicone gel breast implants could have no conceivable effect upon, and therefore were not related to, the bankruptcy estate of The Dow Corning Corporation. The district court held that it did not have "related to" jurisdiction over those claims pursuant to 28 U.S.C. § 1334(b) and concluded that they could not be transferred to it pursuant to 28 U.S.C. § 157(b)(5). For the following reasons, we REVERSE and REMAND for further proceedings consistent with this opinion.[1]

---

* The Honorable Thomas A. Wiseman, Jr., Senior United States District Judge for the Middle District of Tennessee, sitting by designation.

[1] In this amended opinion, we adhere to our April 9, 1996 decision in this case, but seek to clarify the scope of our ruling and the impact we intend it to have. The opinion is therefore amended and reissued as follows,

I.

Until it ceased their manufacture in 1992, Dow Corning was the predominant producer of silicone gel breast implants, accounting for nearly 50% of the entire market. In addition, Dow Corning supplied silicone raw materials to other manufacturers of silicone gel breast implants. In recent years, tens of thousands of implant recipients have sued Dow Corning, claiming to have been injured by autoimmune reactions to the silicone in their implants. Dow Chemical Company, Corning Incorporated, Minnesota Mining and Manufacturing Company, Baxter Healthcare Corporation and Baxter International Incorporated,[2] and Bristol-Myers Squibb Company and Medical Engineering Corporation[3] are other manufacturers and suppliers of silicone gel-filled implants, and are codefendants with Dow Corning in a large number of personal injury actions.

On June 25, 1992, prior to Dow Corning's filing of its Chapter 11 petition, the Federal Judicial Panel on Multidistrict Litigation ordered the consolidation of all breast implant actions pending in federal courts for coordinated pretrial proceedings, and transferred those actions to Chief Judge Pointer of the Northern District of Alabama. On September 1, 1994, Chief Judge Pointer certified a class for settlement purposes only, and approved a complex agreement between members of the class and certain defendants that contemplated the creation of a $4.25 billion fund to cover, among other things, the costs of treatment and other expenses incurred by breast implant recipients. Each class member was given the opportunity to opt out of the class and to pursue her individual claims separately. Several thousand plaintiffs opted out of the

---

[2] Baxter never designed, manufactured, or marketed breast implants, but is a defendant in personal injury actions as a result of certain corporate acquisitions and mergers. The Baxter implants were actually made by The Heyer-Schulte Company.

[3] The Bristol-Myers Squibb implants were made by a subsidiary, The Medical Engineering Corporation.

settlement class, while approximately 440,000 elected to register for inclusion in the Global Settlement.[4]

Due to the litigation burden imposed by what is one of the world's largest mass tort litigations, and the threatened consequences of the thousands of product liability claims arising from its manufacture and sale of silicone breast implants and silicone gel, Dow Corning filed a petition for reorganization under Chapter 11 of the Bankruptcy Code on May 15, 1995, in the United States District Court for the Eastern District of Michigan. The district court had jurisdiction over that proceeding pursuant to 28 U.S.C. § 1334(a). As a result of Dow Corning's Chapter 11 filing, all breast implant claims against it were automatically stayed pursuant to 11 U.S.C. § 362(a). Claims against Dow Corning's two shareholders, Dow Chemical and Corning Incorporated, and the other nondebtor defendants were not stayed. Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter and Bristol-Myers Squibb subsequently removed many opt-out claims in which those companies were named defendants with Dow Corning from state to federal court pursuant to 28 U.S.C. § 1452(a).

On June 12, 1995, Dow Corning filed a motion pursuant to 28 U.S.C. § 157(b)(5)[5] to transfer to the Eastern District of Michigan opt-out breast implant claims pending against it and its shareholders, Dow Chemical and Corning Incorporated.[6] Dow Corning's motion covered claims that had been

---

[4] It has since become clear that the original Global Settlement will not hold together because the sums provided are inadequate to fund the claims filed by over 100,000 plaintiffs. Unless a modified settlement is reached, thousands of opt-in plaintiffs and thousands of claimants who have yet to file actions are likely to file or reactivate individual suits against the breast implant defendants in both state and federal courts.

[5] Title 28 U.S.C. § 157(b)(5) states: "The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending."

[6] Dow Corning's motion sought a transfer of lawsuits against it and its shareholders which were not part of the global settlement. Dow

removed to federal court and were pending in the multidistrict forum, as well as claims pending in state courts which were in the process of being removed to federal courts pursuant to 28 U.S.C. § 1452(a). Dow Corning envisioned its transfer motion as the first step in ensuring a feasible plan of reorganization, and indicated that it would seek to have the transferred actions consolidated for a threshold jury trial on the issue of whether silicone gel breast implants cause the diseases claimed. Dow Chemical and Corning Incorporated joined in Dow Corning's motion.

On June 14, 1995, Minnesota Mining, Baxter, and Bristol-Myers Squibb also moved, pursuant to Section 157(b)(5), to transfer to the Eastern District of Michigan the opt-out cases in which those manufacturers, were named as defendants with Dow Corning.[7] In their Section 157(b)(5) motions, Minnesota

---

Corning, Dow Chemical and Corning have stated that "[t]housands of the suits against Dow Corning have included claims against Dow Chemical and Corning, even though neither of those companies designed, manufactured, tested, or sold breast implants." Brief for Dow Corning Corporation, The Dow Chemical Company, and Corning Incorporated at 9. The companies have explained that "[p]laintitfs have generally alleged that the Shareholders are liable for Dow Corning's acts because they purportedly (1) negligently undertook Dow Corning's duties in connection with Dow Corning's products, (2) aided and abetted Dow Corning's manufacture and sale of unsafe products, or (3) conspired with Dow Corning in the sale by Dow Corning of unsafe or inadequately tested products." Id. at 9-10. Dow Corning's transfer motion covered about one-third of the breast implant claims brought by opt-out plaintiffs against Dow Corning.

[7] The Minnesota Mining, Baxter, and Bristol-Myers Squibb motions were limited to personal injury actions in which Dow Corning was a named codefendant with one or more of those parties and the plaintiffs had opted out of the Global Settlement. According to Minnesota Mining, "when [Dow Corning] filed for chapter ll, [it] was a codefendant with [Minnesota Mining] in approximately 75% of implant cases against [Minnesota Mining] . . . [i]n virtually every case, plaintiffs asserted claims of joint and several liability against [Minnesota Mining] and [Dow Corning] for the full amount of their asserted damages. Additionally, approximately 60% of the cases against [Minnesota Mining] involved plaintiffs who had received multiple sets of breast implants, in separate operations, including implants made by [Minnesota Mining] and at least one other manufacturer, which in most cases

Mining, Baxter, and Bristol-Myers Squibb also asked the district court to order that the claims at issue be transferred to the district court in which the bankruptcy case is pending so that the court could conduct a consolidated trial on the issue of causation.

On September 12, 1995, the district court issued two opinions and companion orders regarding the Section 157(b)(5) transfer motions. With respect to opt-out breast implant cases pending against Dow Corning, the district court asserted jurisdiction under Section 1334(b) and permitted transfer pursuant to Section 157(b)(5). The district court, however, denied the remainder of the transfer motions on the ground that, as a matter of law, it lacked subject matter jurisdiction over the claims sought to be transferred because they were not "related to" Dow Corning's bankruptcy proceeding pursuant to 28 U.S.C. § 1334(b). In denying the transfer motions, the district court also directed that individual federal courts nationwide dismiss or sever Dow Corning and/ or remand the combined opt-out actions to state court, and enjoined the nondebtor codefendants from removing any other cases from state to federal court pursuant to 28 U.S.C. § 1452 if the only basis for such removal was 28 U.S.C. § 1334(b) or 28 U.S.C. § 1367(a). In a September 14, 1995 order, the district court extended its rulings to include opt-in breast implant claims.

---

included [Dow Corning]." Brief for Minnesota Mining and Manufacturing Company at 6. The Baxter motion "covered personal injury actions in which both the Debtor and Baxter were named defendants and the plaintiff had opted out of the Global Settlement." Brief for Baxter Healthcare Corporation and Baxter International Inc. at 3. Baxter has stated that the actions in which "both the Debtor and Baxter are defendants number more than 5,000 . . . in most of which the Debtor and Baxter are alleged to be joint tortfeasors and jointly and severally liable for the damages asserted." Id. at 9. Bristol-Myers Squibb motion explained that the company sought to have the district court transfer the opt-out cases in which it was a named codefendant with Dow Corning. Brief for Bristol-Myers Squibb Company and Medical Engineering Corporation at 5. The Minnesota Mining, Baxter. and Bristol-Myers Squibb motions covered approximately two-thirds of the breast implant claims asserted by opt-out plaintiffs against Dow Corning.

Dow Corning, Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter, and Bristol-Myers Squibb subsequently filed appeals seeking review of the district court's partial denial of their motions to transfer. Those appeals were consolidated on October 10, 1995, and we are now faced with a complex set of questions pertaining to the scope of a district court's jurisdiction when it sits in bankruptcy, and its power to fix venue for the trial of wrongful death and personal injury tort claims that are "related to" a bankruptcy proceeding. In addressing these issues, we begin, as we do in any case involving a question of statutory construction, with the express language of the statute at issue and an examination of Congressional intent. In addition, we recognize that our decision will significantly impact the future course of this massive litigation. Realizing that we cannot satisfy all competing interests perfectly, our primary goal is to establish a mechanism for resolving the claims at issue in the most fair and equitable manner possible. In seeking to achieve that goal, we are called upon to balance four different, and frequently competing, interests: those of the individuals who have brought and will bring breast implant claims; Dow Corning's interests with regard to its attempt to formulate a successful reorganization plan; Dow Chemical and Corning Incorporated's interests as shareholders of Dow Corning; and the judicial system's interest in allocating its limited resources effectively and efficiently.

II.

As a threshold matter, we must determine whether the district court's partial denial of the motions to transfer is immediately appealable. These issues are certainly fluid. Our general jurisdiction to review a decision or order of a district court sitting in bankruptcy is governed by 28 U.S.C. § 1291. *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1009 (4th Cir.1986), *cert. denied*, 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986) ("*A.H. Robins Co. I*"); *In re Salem Mortgage Co.*, 783 F.2d 626, 629 n. 15 (6th Cir.1986) (stating that

Congress apparently assumed Section 1291 would be available for bankruptcy appeals because that provision was at one time proposed to be the exclusive source of such jurisdiction). Title 28 U.S.C. § 1291 permits appeals only from "final decisions of the district courts." This finality requirement is considered "in a more pragmatic and less technical way in bankruptcy cases than in other situations." *In re Cottrell*, 876 F.2d 540, 541-42 (6th Cir.1989)(citing *In re Amatex Corp.*, 755 F.2d 1034, 1039 (3d Cir.1985)). In bankruptcy cases, "a 'functional' and 'practical' application [of Section 1291] is to be the rule." *A.H. Robins Co. I*, 788 F.2d at 1009. The reason for a more relaxed rule of appealability in bankruptcy cases is that:

> Bankruptcy cases frequently involve protracted proceedings with many parties participating. To avoid the waste of time and resources that might result from reviewing discrete portions of the action only after a plan of reorganization is approved, courts have permitted appellate review of orders that in other contexts might be considered interlocutory.

Id. at 1009 (citations omitted). Therefore, where an order in a bankruptcy case "finally dispose[s] of discrete disputes within the larger case," it may be appealed immediately. *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir.1983). We find that the district court's order entered in bankruptcy satisfies the finality requirement of Section 1291 for purposes of appealability.

We also believe appealability of the district court's order is sustainable under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). *Cohen* holds that it is not always necessary that a judgment terminate an action before an appeal may be brought, and permits appellate review of decisions which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546, 69 S.Ct. at 1225-26.

A collateral order is reviewable under *Cohen* when it: (1) conclusively determines the disputed question; (2) resolves an important question completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from final judgment. *Pacor, Inc. v. Higgins*, 743 F.2d 984, 988 (3d Cir.1984) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457-58, 57 L.Ed.2d 351 (1978)). These three factors are equally fluid and are applied flexibly in determining whether an order involving a bankruptcy proceeding is reviewable. *In re Pan Am Corp.*, 16 F.3d 513, 515 (2d Cir.1994) ("*In re Pan Am Corp. I*"). Here we believe these conditions have been satisfied on all grounds. The district court's order conclusively determines that claims pending against the nondebtor defendants are not "related to" Dow Corning's bankruptcy proceeding for purposes of Section 1334(b). In addition, resolution of the "related to" jurisdictional question does not involve consideration of the merits of the pending tort claims. Finally, due to the unique circumstances of this case and the hardship that would inevitably result if we were to refrain from addressing the issues presented by this appeal at this time, the issues presented will be effectively unreviewable after a final judgment is rendered.

Because appellate jurisdiction exists, we turn to the questions on appeal.

III.

The first issue to be resolved is whether the district court has subject matter jurisdiction over breast implant claims pending not only against the debtor, Dow Corning, but also over certain claims pending against the nondebtor defendants. The nondebtor defendants argue that such jurisdiction exists pursuant to 28 U.S.C. § 1334(b) or, alternatively, 28 U.S.C. § 1367(a). We review the district court's jurisdictional ruling *de novo*. *In re Wolverine Radio Co.*, 930 F.2d 1132, 1138 (6th Cir.1991) (citation omitted).

Section 1334 grants jurisdiction to district courts in bankruptcy cases and proceedings as follows:

> (a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or *related to cases under title 11*.

28 U.S.C. § 1334 (emphasis added).

In addressing the extent of a district court's bankruptcy jurisdiction under Section 1334(b) over civil proceedings "related to" cases under title 11, we start with the premise that the "emphatic terms in which the jurisdictional grant is described in the legislative history, and the extraordinarily broad wording of the grant itself, leave us with no doubt that Congress intended to grant to the district courts broad jurisdiction in bankruptcy cases." *In re Salem*, 783 F.2d at 634. Although "situations may arise where an extremely tenuous connection to the estate would not satisfy the jurisdictional requirement" of Section 1334(b), *Robinson v. Mich. Consol. Gas Co., Inc.*, 918 F.2d 579, 584 (6th Cir.1990), Congressional intent was "to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *Celotex Corp. v. Edwards*, 115 S.Ct. 1493, 1499 (1995) (citations omitted).

The definition of a "related" proceeding under Section 1334(b) was first articulated by the Third Circuit in *Pacor*. As stated in that case, the "usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Pacor*, 743 F.2d at 994. An action is "related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling

and administration of the bankrupt estate." *Id.* A proceeding "need not necessarily be against the debtor or against the debtor's property" to satisfy the requirements for "related to" jurisdiction. *Id.* However, "the mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate does not bring the matter within the scope of section [1334(b)]." *Id.* (stating also that "[j]udicial economy itself does not justify federal jurisdiction"). Instead, "there must be some nexus between the 'related' civil proceeding and the title 11 case." *Id.*

Our Circuit adopted the *Pacor* test for determining whether a civil proceeding is "related to" a bankruptcy proceeding under Section 1334(b) in *Robinson*, 918 F.2d at 583 (noting in doing so that circuit courts have "uniformly adopted an expansive definition of a related proceeding under section 1334(b)"). The majority of our sister circuits have likewise adopted the *Pacor* test for "related to" jurisdiction. *See In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir.1991); *In re Gardner*, 913 F.2d 1515, 1518 (10th Cir.1990); *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 788 and n.19 (11th Cir.1990); *In re Fietz*, 852 F.2d 455, 457 (9th Cir.1988); *In re Wood*, 825 F.2d 90, 93 (5th Cir.1987); *In re Dogpatch, U.S.A., Inc.*, 810 F.2d 782, 786 (8th Cir.1987); *A.H. Robins Co. I*, 788 F.2d at 1002 n. 11. According to the Supreme Court, the Second and Seventh Circuits have adopted slightly different tests for determining whether Section 1334(b) jurisdiction exists. *Celotex*, 115 S.Ct. at 1499 n. 6 (citing *UNR Indus., Inc. v. Continental Casualty Co.*, 942 F.2d 1101, 1103 (7th Cir.1991), *cert. denied* 503 U.S. 971 (1992) and *In re Turner*, 724 F.2d 338, 341 (2d Cir.1983)).

In addition, the Supreme Court recently cited *Pacor* with approval in addressing the broad scope of the jurisdictional grant in Section 1334(b). The Court stated:

> Congress did not delineate the scope of "related to" jurisdiction, but its choice of words suggests a grant of some breadth. The jurisdictional grant in [Section] 1334(b) was a distinct departure from the jurisdiction conferred under previous acts, which had been limited to

> either possession of property by the debtor or consent as a basis for jurisdiction. We agree with the views expressed by the Court of Appeals for the Third Circuit in *Pacor* that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate," and that the "related to" language of [Section] 1334(b) must be read to give district courts (and bankruptcy courts under [Section] 157(a)) jurisdiction over more than simple proceedings involving the property of the debtor or the estate.

Celotex, 115 S.Ct. at 1498-99 (citations omitted) (recognizing at the same time that a bankruptcy court's jurisdiction cannot be limitless). The Court also stated that proceedings "related to" a bankruptcy proceeding include "suits between third parties which have an effect on the bankruptcy estate." *Id.* at 1499 n. 5 (citing 1 Collier on Bankruptcy § 3.01[1][c][iv], pp. 3-28 (15th ed.1994)). With these standards in mind, we turn to an examination of whether subject matter jurisdiction exists pursuant to Section 1334(b) over joint claims pending against Dow Corning and the various nondebtor defendants.

In their briefs and at oral argument, Dow Corning, Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter and Bristol-Myers Squibb proposed several theories for the existence of Section 1334(b) subject matter jurisdiction over certain breast implant claims pending against the nondebtor defendants, no one of which has been clearly determined to definitively confer "related to" jurisdiction under Section 1334(b). Specifically, the defendants argued that contingent claims for contribution and indemnification, jointly-held insurance policies,[8] the possibility of collateral estoppel with a corresponding increased exposure to liability, and the burden of defending against the overwhelming number of breast implant claims all give rise to the possibility that the Dow Corning estate will be seriously impacted if the claims at

---

[8] Dow Chemical and Corning Incorporated are co-insured with Dow Corning under various liability policies.

issue, all of which to some degree affect the reorganization of Dow Corning under Chapter 11, are permitted to proceed in separate forums nationwide. We believe two of these theories support a finding that the district court has "related to" jurisdiction over claims at issue, and address them in turn.[9]

1. Claims for Contribution and Indemnification

Dow Corning, Dow Chemical and Corning Incorporated argue that the district court erred in its determination that "related to" jurisdiction does not exist over certain breast implant claims asserted against Dow Chemical and Corning Incorporated because, in addition to the claims asserted by the personal injury claimants, Dow Chemical and Corning Incorporated have asserted cross-claims against each other and Dow Corning in the underlying litigation, which will have an effect on the bankruptcy estate.[10] Minnesota Mining, Baxter, and Bristol-Myers Squibb argue that, despite the fact that they have not yet filed contribution and indemnification claims or proofs of claim relating to implant litigation in Dow Corning's bankruptcy case, they have contingent claims for contribution and indemnification that will have a conceivable effect on the bankruptcy proceedings. Minnesota Mining, Baxter, and Bristol-Myers Squibb therefore argue that the breast implant claims covered by their Section 157(b)(5) motions will give rise to thousands of claims against Dow Corning for indemnification and contribution. In addition, the nondebtor defendants claim that Dow Corning may itself have claims against them for contribution and indemnification

---

[9] In our original opinion, we addressed the two additional arguments proffered by the movants in support of their assertion that "related to" jurisdiction exists over claims pending against Dow Corning and the nondebtor defendants. Upon reconsideration, we believe our finding that "related to" jurisdiction exists is best supported by the contribution and indemnification and joint insurance theories.

[10] According to Dow Corning, Dow Chemical, and Corning Incorporated, the shareholders have asserted "thousands of cross-claims for indemnity and contribution against Dow Corning in breast implant suits." (Brief for Dow Corning Corporation, The Dow Chemical Company, and Corning Incorporated at 21).

under theories of joint and several liability. The companies argue that these claims need to be resolved as part of Dow Corning's bankruptcy proceedings and reorganization plan, and certainly will affect the debtor's rights, liabilities, options, and freedom of action in the administration of its estate.

Relying on *Pacor*, the district court rejected this basis for "related to" jurisdiction and held that the possibility of contribution or indemnification should only be regarded as relevant if and when judgments are actually entered against the nondebtors. The district court stated:

> In the instant case, as in *Pacor*, there will be no contingent claim by the Shareholders against the debtor for indemnification until such time as a judgment is rendered and, then, the non-debtors would still have to proceed with an entirely separate proceeding in order to obtain indemnification from the Debtor under 11 U.S.C. § 502.

Pacor involved John and Louise Higgins' claim against the Philadelphia Asbestos Co. (Pacor) in state court seeking damages allegedly caused by Mr. Higgins' work-related exposure to asbestos supplied by the company. In response, Pacor filed a third-party complaint impleading the Johns-Manville Corporation, which Pacor claimed was the original manufacturer of the asbestos. After Johns-Manville filed for Chapter 11, a dispute ensued as to whether the Higgins-Pacor action was "related to" the Manville bankruptcy so that the entire controversy could be removed to bankruptcy court. The Third Circuit held that the primary Higgins-Pacor action would not affect the Manville bankruptcy estate, and therefore was not "related to" the bankruptcy proceedings. The court stated that the Higgins-Pacor action was, "[a]t best, a mere precursor to the potential third party claim for indemnification by Pacor against Manville," and held that, because all issues with regard to Manville's possible liability would be resolved in a subsequent third party impleader action, "there would be no automatic creation of liability against Manville on account of

a judgment against Pacor." *Pacor*, 743 F.2d at 995 (stating also that "[t]here would therefore be no effect on administration of the estate, until such time as Pacor may choose to pursue its third party claim"). Thus, the court in *Pacor* viewed the absence of "automatic" liability on the part of the debtor as dispositive in determining that Section 1334(b) "related to" jurisdiction did not exist.

It has become clear following *Pacor* that "automatic" liability is not necessarily a prerequisite for a finding of "related to" jurisdiction. The Third Circuit itself has emphasized that:

> A key word in [the] test is "conceivable." Certainty, or even likelihood, is not a requirement. Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact on "the debtor's rights, liabilities, options, or freedom of action" or the "handling and administration of the bankrupt estate."

In re Marcus Hook Dev. Park Inc., 943 F.2d 261, 264 (3d Cir.1991) (citation omitted).

Our Circuit has held that Section 1334(b) "does not require a finding of definite liability of [an] estate as a condition precedent to holding an action related to a bankruptcy proceeding." *In re Salem*, 783 F.2d at 635. In *In re Salem*, our Court reversed a district court's determination that it lacked Section 1334(b) subject matter jurisdiction over a proposed settlement order entered by the bankruptcy court. Prior to bankruptcy, Salem Mortgage Company and related debtor and nondebtor corporations acted as mortgage brokers. Salem and three related corporations filed voluntary petitions under Chapter 11 and the bankruptcy court ordered the petitions of the four debtors consolidated for administration. The Michigan Attorney General subsequently filed an adversary proceeding against the debtors and eight other defendants. The major parties in interest negotiated a stipulation for temporary class certification and a proposed final consent judgment, which was conditionally approved by the bankruptcy court. The bankruptcy court eventually entered a Proposed Order Approving Class Certification, Settlement of Class Action

Litigation, and Entry of Consent Judgment. While reviewing the proposed order, the district court raised the question of whether it possessed "related to" subject matter jurisdiction over the adversary proceeding, and concluded it did not. Our Court reversed that determination stating:

> The proposed order in this case provided that the plaintiff classes would release all claims against the debtors arising from the mortgage transactions except for claims concerning the alleged misappropriation of escrow funds. The order also provided that the debtors pay civil penalties under the Michigan Consumer Protection Act. The corporations' penalties are to be subordinated to the claims of the general creditors. Resolution of the dispute, moreover, will affect the liability of the debtors to the investors. For example, to the extent the value of the mortgages is reduced by their reformation, the investors may have an action against the debtors such as breach of the assignment agreement. Because of the nature of these mortgage transactions, we hold that this dispute is sufficiently related to the estate of the bankrupt such that the district court had jurisdiction over the subject matter.

Id. at 634. The Court stated that the case was distinguishable from *Pacor* on the ground that a finding of definite liability of an estate is not a prerequisite to holding an action "related to" a bankruptcy proceeding, and because the parties in the mortgage transactions in the proceeding at issue were "more intertwined" than the parties in *Pacor*. *Id.* at 635.

This Court's decision in *In re Salem* has been cited for the proposition that "when [a] plaintiff alleges liability resulting from the joint conduct of the debtor and non-debtor defendants, bankruptcy jurisdiction exists over all claims under section 1334." *In re Wood*, 825 F.2d at 94 (citing *In re Salem*, 783 F.2d at 634). *In re Wood* involved a dispute among the directors/stockholders of a medical clinic. Dr. Arthur Wood, III sued Dr. and Mrs. James Wood and Woodrow Barham for the wrongful appropriation of corporate assets. Before the filing of Dr. Arthur Wood's single complaint

against all three defendants, Dr. and Mrs. James Wood had filed a Chapter 11 petition. A dispute subsequently ensued as to whether the entire matter fell within bankruptcy jurisdiction. The Fifth Circuit held that the "complaint [was] sufficiently related to the pending bankruptcy to allow the district court to exercise jurisdiction under section 1334." *In re Wood*, 825 F.2d at 93. The Court further stated:

> The complaint against the bankruptcy debtors could have a conceivable effect on their bankruptcy. The plaintiff seeks to recover stock and monies that the debtors allegedly appropriated from the clinic. They seek to resolve the disputed allocation of interest in the clinic. To the extent that the debtors' interest in the clinic, their stock holdings, or their withdrawals are now property of the estate, the complaint against them has a potential effect on their estate.

Id. at 93-94. The Court acknowledged the possibility that the complaint, which raised a post-petition claim, could ultimately have no effect on the bankruptcy proceeding. Unable, however, to conclude that the suit would have *no* conceivable effect on that proceeding, the court found "related to" jurisdiction as to both the debtor and nondebtor defendants, stating:

> The plaintiff has filed one complaint against the defendants seeking liability for their joint conduct. Success against any of the defendants will have a potential effect on the estate. For example, if Dr. Wood and his wife are held liable but Barham is not, the bankrupt estate may bear the entire burden of the judgment. If, on the other hand, Barham is found jointly liable, the estate may bear only a portion of the judgment. Moreover, in filing the complaint, the plaintiff challenged the combined actions of both the debtors and Barham, a non-debtor. Resolution of the dispute will necessarily involve, therefore, consideration of Barham's involvement in those actions. We find support in the Court of Appeals for the Sixth Circuit and lower courts, which have held that

> when the plaintiff alleges liability resulting from the joint conduct of the debtor and non-debtor defendants, bankruptcy jurisdiction exists over all claims under section 1334.

Id. at 94.

The degree of identity between a debtor and nondebtor codefendants was an important factor in *A.H. Robins Co. I*, a mass tort case involving the Dalkon Shield, an intrauterine contraceptive device. In that case, A.H. Robins was faced with an overwhelming number of federal and state actions seeking damages for injuries allegedly sustained by the use of the Dalkon Shield. The pending litigation caused A.H. Robins, the manufacturer of the device, to file a petition under Chapter 11 of the Bankruptcy Code. By the time A.H. Robins filed its petition, over 5,000 suits had been filed. More than half named A.H. Robins as the sole defendant, while a codefendant or codefendants were named in the others. When the filing of the petition automatically stayed all suits against A.H. Robins under Section 362(a), a number of plaintiffs in suits in which A.H. Robins was named along with at least one codefendant sought to sever their actions against A.H. Robins and proceed against the codefendant or codefendants. A.H. Robins then sought injunctive relief restraining the prosecution of the actions against its codefendants. The district court granted a preliminary injunction, holding that all actions that might be satisfied from proceeds of the debtor's products liability policy with Aetna Casualty and Insurance Company were stayed, and enjoined further litigation in eight civil actions.

Shortly after entry of the preliminary injunction, A.H. Robins moved for: a determination of trial venue of all Dalkon Shield suits; identification of such cases as were "related to" the Chapter 11 case; and transfer of such cases to the Eastern District of Virginia for trial. The district court held that: (1) pursuant to Section 1334(b), all actions based upon personal injury tort or wrongful death claims arising from the use of the Dalkon Shield were proceedings related to the Chapter 11 case; (2) pursuant to Sections 157(b)(5) and

1334(b), all such actions, wherever pending, were to be tried in the Eastern District of Virginia; (3) all actions related to the Chapter 11 case then pending in or subsequently removed to any federal district court during the pendency of the Chapter 11 case were to be transferred to the Eastern District of Virginia; and (4) the court was not prevented from later abstaining under Section 1334(c)(1) or remanding under Section 1452(b). This order and the preliminary injunction were both appealed to the Fourth Circuit.

In discussing the propriety of the stay issued against A.H. Robins' nondebtor codefendants, the Fourth Circuit stated that, although Section 362(a)(1) is generally available only to a debtor, proceedings against nonbankrupt codefendants may be stayed by a bankruptcy court where there are "unusual circumstances." *A.H. Robins Co. I*, 788 F.2d at 999. Such a situation arises when "there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor." *Id.* The court stated that "an illustration of such a situation would be a suit against a third-party who is entitled to absolute indemnity by the debtor on account of any judgment that might result against them in the case." *Id.* In addition, such a relationship may exist where codefendant liability is "directly attributable to the debtor." *Id.* at 1004.

Based on the principles outlined above, we believe the district court has "related to" subject matter jurisdiction over the breast implant claims pending against the nondebtor defendants in this case. Thousands of suits asserted against Dow Corning include claims against the nondebtors, and the nature of the claims asserted establishes that Dow Corning and the various nondebtor defendants are closely related with regard to the pending breast implant litigation.[11] Dow Chemical and

---

[11] The opt-out claims asserted against Dow Corning and the various nondebtor defendants generally can be divided into four categories: (i) "Multiple Implant Actions," which are actions where plaintiffs received implants manufactured by both Dow Corning and one or more of the nondebtors; (ii) "Supplier Actions," which involve

Corning Incorporated have already asserted cross-claims against each other and Dow Corning in the underlying litigation, and the other nondebtor defendants have asserted repeatedly throughout their briefs, motions, and oral arguments that they intend to file claims for contribution and indemnification against Dow Corning, and we have no reason to doubt the veracity of those assertions at this time.

We find that it is not necessary for the appellees first to prevail on their claims against the nondebtor defendants, and for those companies to establish joint and several liability on Dow Corning's part, before the civil actions pending against the nondebtors may be viewed as conceivably impacting Dow Corning's bankruptcy proceedings. The claims currently pending against the nondebtors give rise to contingent claims against Dow Corning which unquestionably could ripen into fixed claims. The potential for Dow Corning's being held liable to the nondebtors in claims for contribution and indemnification, or vice versa, suffices to establish a conceivable impact on the estate in bankruptcy. Claims for indemnification and contribution, whether asserted against or by Dow Corning, obviously would affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as Dow Corning's ability to resolve its liabilities and proceed with reorganization. In addition, we believe there is a qualitative difference between the single suit involved in *Pacor* and the overwhelming number of cases asserted against Dow Corning and the nondebtor defendants in this case. A single possible claim for indemnification or contribution simply does not represent the same kind of threat to a debtor's

---

claims against the nondebtors as manufacturers and claims against Dow Corning as the supplier of silicone materials to the nondebtors; (iii) "Conspiracy Actions," which allege that Dow Corning and the nondebtors conspired to defraud the plaintiffs by fraudulently withholding material information regarding the hazards of breast implants: and (iv) "Form Complaint Actions," which simply name Dow Corning and the nondebtors as defendants without making any specific allegations of individual wrongdoing. (See Motion of Minnesota Mining and Manufacturing Company for an Order Pursuant to 28 U.S.C. § 157(b)(5) at 7).

reorganization plan as that posed by the thousands of potential indemnification claims at issue here.

Cognizant of the fact that "related to" jurisdiction cannot be limitless and concerned about granting benefits of the automatic stay in bankruptcy to solvent codefendants, we nevertheless believe the possibility of contribution or indemnification liability in this case is far from attenuated. We conclude that Section 1334(b) jurisdiction exists over the actions pending against Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter, and Bristol-Myers Squibb that are the subject of the companies' Section 157(b)(5) motions.

2. Joint Insurance

Dow Corning, Dow Chemical and Corning Incorporated also argue that "related to" jurisdiction exists as to claims pending against the shareholders because the three companies share joint insurance. We believe this argument provides additional support for the existence of "related to" jurisdiction under the unique facts of this case, but address it only briefly because we have already concluded that Section 1334(b) jurisdiction exists over breast implant claims pending against Dow Corning and one or both of its parents.

Dow Corning, Dow Chemical and Corning Incorporated are co-insured under various insurance policies, which together provide over $1 billion in coverage. Dow Corning's interest in the policies is one of the largest assets of its bankruptcy estate. In addition, Dow Corning recently entered into ten new insurance settlements under which the estate will receive, if approved by the bankruptcy court, approximately $350 to $450 million in cash. Most of these settlements involve policies under which Dow Chemical or Corning Incorporated is a co-insured.

Dow Corning, Dow Chemical, and Corning Incorporated claim that the district court's order, by allowing thousands of claims to proceed separately against Dow Chemical and Corning Incorporated, will diminish the value of this major bankruptcy asset to the extent that settlements, judgments and defense costs incurred by the shareholders will exhaust pol-

icy limits otherwise available to Dow Corning, its creditors, and individuals asserting claims in the bankruptcy proceedings. In addition, all three co-insureds argue that the policies will be further diminished if and when payments must be made to Minnesota Mining, Baxter, or Bristol-Myers Squibb. Dow Chemical has already notified insurers that it is asserting claims against the jointly-held policies on the ground that, as a co-insured, it is entitled to recover from the insurers all of its defense costs, as well as any settlements or judgments paid by it in litigating breast implant claims. The concern, then, is that permitting scores of trials against the shareholders to go forward while litigation against the debtor is stayed may result in the shareholders making claims for insurance and seeking and obtaining payment from the insurers before Dow Corning is able to make any claims of its own.

The district court rejected this argument for the existence of "related to" jurisdiction, holding that, while a bankruptcy court has broad discretion over a debtor's interest in a liability insurance policy shared with a nondebtor, no judgment has been entered yet against Dow Chemical or Corning Incorporated and neither company has a claim pending against the insurance policies at this time. We believe the district court is in error because, as we stated earlier, an immediate impact on a debtor's estate is not a prerequisite for Section 1334(b) jurisdiction. Under the facts of this case, we believe the possible depletion of insurance policies depends on contingencies sufficiently immediate to support a finding of "related to" jurisdiction. *See, e.g., A.H. Robins Co. I*, 788 F.2d at 1008 (stating that "irreparable harm would be suffered by the debtor and by the defendants since any of [the] suits against [the] co-defendants, if successful, would reduce and diminish the [debtor's] insurance fund"); *In re Zale Corp.*, 62 F.3d 746, 758-59 (5th Cir.1995) (concluding that, where disputes regarding an insurance policy can have an effect on a debtor's estate, the bankruptcy court has "related to" jurisdiction over nondebtors' claims against the insurer); *Coar v. National Union Fire Ins. Co.*, 19 F.3d 247, 249 (5th Cir.1994) (stating that, where there is a "cognizable threat" that insurance policy proceeds would not cover plaintiffs' claims and could

expose the debtor's estate to liability, a suit against a debtor's insurer is "related to" the debtor's bankruptcy case); *In re Titan Energy, Inc.*, 837 F.2d 325, 329 (8th Cir.1988) (noting that the scope of a products liability insurance policy affects the size of a debtor's estate for distribution).

Dow Corning's interest in the insurance policies at issue is property of its estate under the expansive definition set forth in 11 U.S.C. § 541(a)(1). The threat posed to those insurance policies if claims pending against Dow Chemical and Corning Incorporated are permitted to go forward in a separate manner supports a finding of "related to" jurisdiction under Section 1334(b). The prospect of Dow Chemical and Corning Incorporated being able to assert mature, liquidated claims against the insurance proceeds if litigation pending against them is permitted to go forward demonstrates a conceivable impact on the bankruptcy proceedings. If it is determined that Dow Chemical or Corning Incorporated has a priority to the insurance proceeds, even if the bankruptcy court has the power to prevent payments of the proceeds while Dow Corning is in bankruptcy, the risk remains that the insurance coverage may be eviscerated when the proceeds are eventually distributed. In addition, certain of the policies cover defense expenses, and those costs alone may significantly reduce the pool of coverage available to Dow Corning if the claims pending against Dow Chemical and Corning Incorporated are allowed to proceed separately. In addition, the bankruptcy court has yet to determine whether it has the power to prevent Dow Corning's co-insureds from receiving proceeds of the jointly-held policies while Dow Corning is in bankruptcy. Resolution of the dispute over the right to proceeds alone will have a conceivable effect on Dow Corning's bankruptcy proceedings.

IV.

We next address the power of the district court, sitting in bankruptcy, to fix the venue for the trial of personal injury tort and wrongful death claims asserted in non-bankruptcy

forums pursuant to 28 U.S.C. § 157(b)(5). Section 157(b)(5) provides:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

The purpose of Section 157(b)(5) is "to centralize the administration of the estate and to eliminate the 'multiplicity of forums for the adjudication of parts of a bankruptcy case.' " *A.H. Robins Co. I*, 788 F.2d at 1011 (citation omitted). Centralization of claims increases the debtor's odds of developing a reasonable plan of reorganization which will "work a rehabilitation of the debtor and at the same time assure fair and non-preferential resolution of the . . . claims." *Id.*

It has been established that a "bankrupt debtor who is a defendant in a personal injury action may move under section 157(b)(5) to transfer the case to one of two venues: (1) the district where the bankruptcy is proceeding; or (2) the district where the claim arose." *In re Pan Am Corp. I*, 16 F.3d at 516. The question for our consideration is whether Section 157(b)(5) allows for the transfer of personal injury and wrongful death claims pending against nondebtor defendants who have been sued with a debtor under claims of joint and several liability.

The Fourth Circuit has construed Section 157(b)(5) as permitting the transfer of such cases, and we follow that Circuit's approach. In *A.H. Robins Co. I*, by the time A.H. Robins filed its Chapter 11 petition, 5,000 suits were pending against the company. More than half of those cases named A.H. Robins as the sole defendant, while a codefendant or codefendants were named in the others. After the district court issued a preliminary injunction against suits by A.H. Robins' codefendants, A.H. Robins moved for a determination of trial venue of all Dalkon Shield suits, an identification of cases "related to" the bankruptcy case, and the transfer of those cases to the

district court where the bankruptcy proceedings were being held for trial. The district judge held that, pursuant to Section 1334(b), all actions based upon personal injury tort or wrongful death claims arising from the use of the Dalkon Shield were proceedings "related to" A.H. Robins' Chapter 11 case and that, pursuant to Sections 1334(b) and 157(b)(5), all such actions, wherever pending, were to be tried in the Eastern District of Virginia. In addition, the district court held that all actions "related to" the Chapter 11 case then pending in any federal district court or subsequently removed to any federal district court during the pendency of A.H. Robins' bankruptcy case were to be transferred to the Eastern District of Virginia.

In reviewing the validity of the district court's order fixing the venue for the trial of all Dalkon Shield cases and transferring such cases to the Eastern District of Virginia, the Fourth Circuit stated: "Unquestionably the district court in this case had the power under the statute to fix the trial venue in its district for all the Dalkon Shield cases." *Id.* at 1010 (stating also that the power of the district court to fix venue for all the pending Dalkon Shield tort cases is "stated in unmistakable terms in section 157(b)(5)"). The Fourth Circuit stated its intent in consolidating the Dalkon Shield litigation as follows:

> Since the Dalkon Shield litigation began, forty claims have actually been tried but over $517,000,000 have been expended in defending or settling Dalkon Shield suits or claims. It is impossible to anticipate the stupendous costs that would be involved if all the claims here had to be tried. If the claimants as a whole are to realize reasonable compensation for their claims, it is obviously in the interest of the class of claimants as a whole to obviate the tremendous expense of trying these cases separately. If the bankruptcy court could arrive at a fair estimation of the value of all the claims and submit a fair plan of reorganization based on such estimation, with some mechanism for dispute resolution and acceptable to all interested parties, great benefit to all the

> claimants could be achieved and the excessive expense of innumerable trials, stretching over an interminable time, could be avoided. In addition, the real purpose of the proceedings (i.e., a reorganization of the debtor and its continuance as a going business) could be attained.

Id. at 1013 (footnote omitted). The court stated that these objectives could not be achieved until "all Dalkon Shield claims and suits [were] centralized before a single forum where all interests [could] be heard and in which the interests of all claimants with one another [could] be harmonized." *Id.* at 1014. The court concluded by stating:

> That undoubtedly was the purpose of the motion to fix venue and to transfer the pending suits to the district court sitting in bankruptcy before which the proceedings were pending. This unquestionably was the idea which prompted the district court to opt tentatively in his order fixing venue in the district court sitting in bankruptcy for all these claims. We approve of the idea and find it conducive of the interests of all concerned.

Id. at 1014.

We agree with the Fourth Circuit that Section 157(b)(5) should be read to allow a district court to fix venue for cases pending against nondebtor defendants which are "related to" a debtor's bankruptcy proceedings pursuant to Section 1334(b).[12] This approach will further the prompt fair, and complete resolution of all claims "related to" bankruptcy proceedings, and harmonize Section 1334(b)'s broad jurisdictional grant with the oft-stated goal of centralizing the administration of a bankruptcy estate.

---

[12] We note that our holding here is limited to the district court's ability to consider motions under 28 U.S.C. § 157(b)(5) with respect to the trial venue of the breast implant claims at issue.

V.

Finally, a Section 157(b)(5) motion "requires an abstention analysis." *In re Pan Am Corp.*, 950 F.2d 839, 844 (2d Cir.1991) ("*In re Pan Am Corp. II*"). The abstention provisions of 28 U.S.C. § 1334(c) qualify Section 1334(b)'s broad grant of jurisdiction. *In re Salem*, 783 F.2d at 635. It is for the district court to "determine in each individual case whether hearing it would promote or impair efficient and fair adjudication of bankruptcy cases." *Id.*

Section 1334 provides for two types of abstention: discretionary abstention under 28 U.S.C. § 1334(c)(1) and mandatory abstention under 28 U.S.C. § 1334(c)(2). Section 1334(c)(1) provides:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

Section 1334(c)(2) states in relevant part:

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

For mandatory abstention to apply, a proceeding must: (1) be based on a state law claim or cause of action; (2) lack a federal jurisdictional basis absent the bankruptcy; (3) be commenced in a state forum of appropriate jurisdiction; (4) be capable of timely adjudication; and (5) be a non-core proceeding. Non-core proceedings under Section 157(b)(2)(B) (i.e. liquidation of personal injury tort or wrongful death case)

are not subject to Section 1334(c)(2)'s mandatory abstention provisions pursuant to 28 U.S.C. § 157(b)(4).[13]

The district court in this case determined that Section 157(b)(4) rendered exempt from the mandatory abstention requirement all personal injury tort claims pending solely against Dow Corning, and decided not to abstain discretionarily with regard to those claims at this time. Because the district court found that it did not have subject matter jurisdiction over the claims pending against the nondebtor defendants, it did not address the abstention issue in detail and merely incorporated by reference its analysis of the abstention issue pertaining to claims pending solely against Dow Corning. It also remains to be fully determined whether the abstention exception in Section 157(b)(4) applies to claims pending against nondebtor defendants and, if not, whether the factors calling for mandatory exemption under Section 1334(c)(2) have been met. The district court did not directly address these matters, and we refrain from addressing them in the first instance. Because we believe the district court is in a better position to make the necessary abstention determinations, as to both mandatory and discretionary abstention, we remand the case to the district court for further proceedings on this issue.

VI.

We REVERSE the district court's determination that it lacked subject matter jurisdiction over the tort claims pending against the nondebtor defendants and that it did not have the power to transfer those claims pursuant to Section 157(b)(5). In addition, we REMAND this case to the district court for further proceedings on the issue of Section 1334(c) abstention.

---

[13] Section 157(b)(4) provides that "[n]on-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2)."

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 95-CV-72397-DT

Dated: Sept. 12, 1995.

In Re: DOW CORNING CORPORATION,

Debtor.

MEMORANDUM OPINION AND ORDER
ON THE DEBTOR DOW CORNING'S
MOTION TO TRANSFER

HON. DENISE PAGE HOOD

I. *INTRODUCTION/FACTS:*

This matter is before the court on the Debtor Dow Corning Corporation's motion to transfer certain breast implant cases to the United States District Court, Eastern District of Michigan pursuant to 28 U.S.C. § 157(b)(5). Responses were filed and a hearing was held on the matter.

At the onset, the Court is very cognizant of the rights of the claimants involved in this matter under our judicial system as well as the protections afforded to the Debtor Dow Corning under our bankruptcy laws. With these sometime competing interests in mind, the Court has attempted to balance the rights of both the Debtor and the claimants in its decision.

On May 15, 1995, the Debtor, Dow Corning Corporation, sought a voluntary petition for reorganization under Chapter

11 of the Bankruptcy Code with the Bankruptcy Court of the United States District Court, Eastern District of Michigan, Northern Division in Bay City, before the Honorable Arthur J. Spector. On June 12, 1995, the Debtor filed a motion to transfer certain breast implant cases before the Bankruptcy Court. Judge Spector entered a Determination and Report and Recommendation Regarding the Debtor's Motion to Transfer on June 13, 1995 indicating that the District Court had jurisdiction over this motion. On July 5, 1995, this Court entered an order provisionally transferring the opt-out breast implant cases involving the Debtor only to the Eastern District of Michigan pending a hearing scheduled for the motion on July 31, 1995.

Debtor is a leading producer of silicone products. Dow Corning was formed in 1943 as a corporation owned by Corning Incorporated and Dow Chemical Company (each has a 50% ownership interest) to develop and produce silicones and silicone products during World War II. In 1994, the Debtor Dow Corning's total sales were nearly $2 billion. The Debtor manufactured breast implants for commercial use from approximately 1964 until 1992. During a part of this time, the Debtor also supplied certain raw materials to other breast implant manufacturers. According to the Debtor, in the year of its highest sales in 1991, breast implants only accounted for less than 1% of the Debtor's sales.

Silicone gel breast implants consist of a silicone elastomer "envelope" filled with silicone gel. The implants are surgically implanted for purposes of breast reconstruction in breast cancer patients and for cosmetic reasons. These implants have the same chemical make up as silicone materials used to make catheters, shunts, pacemaker leads and other medical devices.

In the early 1980s, silicone breast implants were subject to occasional product liability lawsuits. By 1987, 50 such lawsuits had been filed. In 1990 and 1992, over 100 lawsuits were filed against the Debtor. However, beginning in 1992, the implant litigation drastically increased. Over 3,000 suits were filed against the Debtor in 1992, over 8,000 in 1993 and

over 7,000 in 1994. The litigation included both individual claims and actions on behalf of putative classes. By early 1995, the Debtor was a Defendant in 45 putative class action lawsuits (31 in various federal district courts, 12 in state courts and 2 in Canada) and over 19,000 individual lawsuits. All the suits combined involved more than 36,000 claimants. The Debtor was sued both as the manufacturer of breast implants and supplier of silicone raw materials to other breast implant manufacturers.

According to the Debtor, these claims uniformally allege that breast implants cause diseases, including autoimmune disease, scleroderma, systemic disorders, joint swelling and chronic fatigue. The damages sought in these cases are substantial, ranging from hundreds of thousands to tens of millions of dollars in compensatory and punitive damages. Claims involving mechanical defects, including rupture of the implants, are also alleged by the claimants.

In June 1992, pursuant to 28 U.S.C. § 1407, the Judicial Panel on Multi District Litigation ("MDL") ordered that federal actions involving breast implants be transferred to the Honorable Sam C. Pointer in the Northern District of Alabama for coordinated or consolidated pretrial proceedings ("MDL No. 926"). *In re Silicone Gel Breast Implants Products Liability Litigation*, MDL No. 926, 793 F.Supp. 1098 (J.P.M.L. 1992).

The Debtor asserts that as that litigation progressed, so did efforts to achieve a global resolution of this controversy. Although the Debtor contends that its products were safe and did not cause the diseases being claimed, it was compelled to recognize that its resources were not unlimited and that the litigation was diverting management's attention from the company's core businesses and that the costs of continued litigation would be substantial. According to the Debtor, in 1994, its litigation costs exceeded $200 million.

After months of negotiations with codefendants and claimants, a court-approved "Steering Committee" representing breast implant claimants, the Debtor and other

implant manufacturers entered into a "global settlement" of breast implant claims on March 23, 1994. The Debtor agreed to contribute up to $2.02 billion (out of a total settlement of $4.25 billion) of the funding required by the settlement. Judge Pointer approved the settlement as fair and reasonable in a September 9, 1994 Order after certifying one of the consolidated federal actions as a class action for purposes of settlement under Fed.R.Civ.P. 23(b)(3).

It appears that the global settlement did not resolve the controversy and the future of that agreement, at this time, is in question. First, the Agreement is oversubscribed in that the claims being made against the established funds exceed the Defendants' funding commitments. Second, numerous claimants have opted not to participate in the settlement, electing instead to pursue individual suits. As of May 1995, over 6,000 claimants had opted out of the global settlement and are pursuing individual actions ("opt-out" claimants). The Debtor asserts that it cannot both fund the settlement and continue to incur substantial litigation costs in connection with the opt-out claimants. These opt-out claims which led to costly proceedings in state courts, are a major reason for the Debtor's decision to seek bankruptcy protection, according to the Debtor.

In early 1992, the Food and Drug Administration ("FDA"), asked for a voluntary moratorium on the production of breast implants. Since that time, the Debtor has tried to verdict six breast implant cases involving nine claimants. The jury returned a verdict in favor of the Debtor in three of the cases, in favor of the plaintiffs in two of the cases; and in the sixth case, involving two plaintiffs, the jury found in favor of one plaintiff and against the other. According to the Debtor, none of the juries have awarded punitive damages in the post-moratorium trials.

The Debtor asserts that breast implant trials are time-consuming. Complex scientific evidence is involved in various scientific fields. The above trials ranged in length from two to eleven weeks, excluding months of preparation that

preceded each trial. According to the Debtor, the central issue was the same: whether silicone gel breast implants cause disease. The Debtor asserts that the complexity of the cases placed at a substantial disadvantage its efforts to deal with the opt-out claims which were being pursued in state courts. The state proceedings were uncoordinated and trial dates were overlapping. When it filed for bankruptcy protection, the Debtor faced approximately ninety trials over the next six months, including seven trials with twenty-eight plaintiffs in Texas during the month of June 1995. From the Debtor's perspective, these conflicting trial settings created frantic conditions that made it impossible to fairly, rationally, and efficiently resolve the central scientific issue of whether implants cause the diseases that are alleged. The Debtor states that it could not succumb to exorbitant settlement demands nor could it go to trial knowing that it could not muster the resources necessary to mount an effective defense on so many fronts simultaneously. The Debtor claims it was forced to seek bankruptcy protection under Chapter 11 of the Bankruptcy Code. However, despite the Chapter 11 proceedings and the automatic stay provisions of 11 U.S.C. § 362, the breast implant litigations are still ongoing. Plaintiffs throughout the United States have filed notices of nonsuit against, dismissals of and motions to sever the Debtor in order to proceed to trial against Dow Chemical Co. and/or Corning, Inc. In June and July 1995, suits against Dow Chemical and/or Corning were set for trial in numerous counties throughout Texas.

The Debtor has envisioned essentially a four-step process in its reorganization proceedings. The Debtor's proposal claims to have taken into account the substantive and procedural rights of the opt-out claimants and also ensures the integrity of the bankruptcy proceeding. The first step is the removal to local federal district courts of state opt-out claims involving the Debtor's implants pursuant to 28 U.S.C. § 1452(a). The second step is the instant motion to transfer, which seeks to have all of the opt-out actions then transferred

to the Eastern District of Michigan. Should the second step be granted, the third step is a motion to consolidate the transferred claims and an early trial on the threshold issue of whether implants cause the diseases being claimed pursuant to Fed.R.Civ.P. 42. The Court would oversee a consolidated, adversary trial that would focus on the scientific evidence as it relates to the core issue of causation which would be binding on all opt-out claimants. The fourth step is for the bankruptcy court to conduct an estimation or other valuation proceeding, taking into account the results of the threshold trial on causation, and to approve a plan of reorganization that is consistent with that determination. Additional proceedings may be thereafter determined by the Court at the conclusion of the estimation or valuation proceedings, taking into account the bankruptcy court's plan of reorganization.

The Official Committee of Tort Claimants ("Tort Claimants" or the "Committee") asserts in its brief in opposition to the Debtor's Motion to Transfer that Dow Chemical and the Debtor knew of and concealed from the public substantial data suggesting that silicones were dangerous to the human body. Notwithstanding the Debtor's and its parents' repeated assurances to the public that its products were safe, jury awards, settlements and a very large proposed class settlement reflect that thousands of women have suffered injuries as a result of receiving the implants. The Committee asserts that apart from the issue of disease causation, many breast implant recipients have been injured and often horribly scarred by the rupturing or leaking of implants. Countless others fear that their implants may rupture or leak in the future. These women either have had or will need to have costly and painful "explanation" surgery to remove their implants and are entitled to substantial damages regardless of whether the leaking silicone also caused a "disease." The Committee further asserts that the incidence of various conditions varies with each woman depending on their particular medical history and biological characteristics.

According to the Committee, several juries of the United States have entered verdicts, ranging into the millions of dollars, holding the Debtor liable for injuries caused by its breast implants. The Committee asserts that the Debtor hopes to wipe out these judgments and this history should it prevail in one consolidated trial in this District and eliminate its liability to tens or hundreds of thousands of injured women.

The Committee states that while the global settlement approved by Judge Pointer of over $4 billion is sizable, it is insufficient to compensate the plaintiffs for the injuries they have suffered. In a report released on June 15, 1995 by the claims administrator appointed by Judge Pointer to implement the global settlement, Texas State Court Judge Ann Cochran, 440,000 women have registered under the settlement as potential claimants.

In its Motion to Transfer, the Committee asserts that the Debtor has wreaked procedural havoc by removing numerous pending state court cases to federal courts. Many of these cases have subsequently been transferred to Judge Pointer as "tag-along" cases by the MDL Panel. These cases join the more than 10,000 actions earlier transferred to Judge Pointer pursuant to the MDL Panel's determination that joint pretrial proceedings before a single court that could develop substantial expertise would conserve resources and best serve the interests of all parties. According to the Committee, the Debtor's attempt to transfer all opt-out actions to this Court would run roughshod over the considered judgments of the MDL Panel and unnecessarily place this Court on a collision course with Judge Pointer. The Committee asserts that Judge Pointer has acquired an intimate and unrivaled familiarity with the breast implant litigation since presiding over the consolidated pre-trial proceedings in the thousands of pending federal breast implant suits in June 1992. Judge Pointer has supervised discovery that has included approximately 225 depositions and production of some 10 million pages of documents and has presided over complex and lengthy proceed-

ings to approve and implement the global settlement since spring 1994.

The Committee further asserts that the Debtor's parent corporations, Dow Chemical and Corning, Inc. are merely trying to ride the coat tails of the Debtor's bankruptcy proceedings in order to benefit from the Debtor's protection under the bankruptcy laws.

The issues before the Court are: 1) whether it has jurisdiction to transfer the claims involving the Debtor; 2) if the Court does have jurisdiction to transfer the claims, whether the Court should abstain from exercising its authority; and 3) whether it has jurisdiction over the claims against the Shareholders.

II. *ANALYSIS*

A. *Whether this Court has the jurisdiction and authority to transfer the cases to the E.D. of Michigan pursuant to 28 U.S.C. § 157(b)(5).*

It is undisputed that the Debtor's bankruptcy case is pending before the Bankruptcy Court, of the United States District Court, Eastern District of Michigan. This Court has original and exclusive jurisdiction of the Debtor's title 11 action pursuant to 28 U.S.C. § 133(a). 28 U.S.C. § 157(b)(5) provides that this District Court has the authority to determine the trial venue of any personal injury tort claims involving the Debtor.

> (5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

Personal injury and wrongful death claimants are specifically subject to the overarching bankruptcy policy of centralizing mass tort litigation so that the claimants' jury trial rights are preserved. *Langenkamp v. Culp*, 498 U.S. 42 (1990). Section 157(b)(5) treats personal injury claims as a special class

within the realm of bankruptcy law. *Calumet Nat'l Bank V. Levine*, 179 B.R. 117, 120 (N.D. Ind. 1995). This section confers enlarged powers upon the district court where the bankruptcy actin was filed to fix venue of personal injury claims *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 832 (5th Cir. 1993), *cert. denied*, 113 S.Ct. 2963 (1993). The district court where the bankruptcy action was filed has the sole authority for ultimately fixing the trial venue for personal injury actions against the bankruptcy debtor. *Calumet*, 179 B.R. at 123.

B. *If this Court does have jurisdiction, whether this Court has the authority to transfer certain opt-out claims from the MDL panel, Case No. 926 and MDL Judge in the N.D. of Alabama to the E.D. of Michigan.*

The Tort Claimants argue that the MDL Panel's previous order preempts this Court's authority to transfer certain opt-out claims from the MDL Panel, Case No. 926 to this Court. Other responses and objections filed with this Court have also argued that this Court has no authority to transfer cases from other districts and that only those district courts have the authority to transfer cases. Generally, the district court where the suit is pending has the sole authority to transfer a suit. However, with regards to a bankruptcy action where personal injury tort claims are involved, the Fourth Circuit in *In re A.H. Robins Co., Inc.*, 788 F.2d 994 (4th Cir. 1986), *cert. denied*, 479 U.S. 876 (1986), stated:

> . . . As the appellants correctly construe [28 U.S.C.] section 1412, the authority to transfer a suit under that statute rests solely with the court in which the suit is pending and it provides no authority whatsoever to a district court sitting in bankruptcy in one district and having jurisdiction of the bankruptcy to transfer the venue of a case against the bankrupt to another district. Section 157(b)(5), however, expressly confers on the district

court sitting in bankruptcy and having jurisdiction of the bankruptcy proceedings the power to fix the venue of any tort case against the debtor pending in other districts. The purpose of this latter statute, was, as Congressman Kastenmeir declared, to centralize the administration of the estate and to eliminate the 'multiplicity of forums for the adjudication of parts of a bankruptcy case.' (cite omitted) That purpose would be thwarted and the plain language of section 157(b)(5) nullified if the power of the district court sitting in bankruptcy to fix the venue for tort claims against a debtor was to be preempted by the provisions of section 1412. We do not believe this to have been the intention of Congress in enacting the two statutes. Section 157(b)(5) was drafted to cover the procedure in connection with a special group of cases, to wit, *personal injury tort claims against a debtor in Chapter 11 proceedings whenever pending and in that connection the section is supreme.* In all other cases related to the bankruptcy proceedings, however, the general statute (i.e., section 1412) would govern. This, we think, is the proper construction to be given the two statutes. It is a construction which harmonizes the two sections. It conforms to that established canon of statutory construction that '[w]e must read the statutes [in those instances where there is any possible conflict] to give effect to each if we can do so while preserving their sense and purpose.' (cites omitted) To accept the appellants' interpretation and to negate the plain language of § 157(b)(5) 'would violate the basic principle of construction that statutes should be read, if possible, as harmonious texts.' (cites omitted) We, therefore, have no difficulty in finding that *the district judge's authority to fix venue of personal injury tort actions against the debtor exists under § 157(b)(5), irrespective of the district in which such controversy is pending.* (emphasis added).

788 F.2d at 1011. In the *A.H. Robins* case, the Court went on to state that the first and primary purpose of the proceedings is to ascertain whether a fair reorganization of the debtor can be achieved. *Id.* at 1012. This purpose may well be completely thwarted if the energies of the debtor's executives and officers are initially diverted by, and the resources of the debtor are dissipated in, the expenses of litigating the trial of thousands of personal injury suits in courts throughout the land spread over an interminable period of time. *Id.* No progress along estimating these contingent claims can be made until all claims and suits are centralized before a single forum where all interests can be heard and in which the interests of all claimants with one another may be harmonized. *Id.* at 1014. However, it should be noted that *A.H. Robins* did not address a situation involving a bankruptcy court, a district court sitting in bankruptcy, and claims previously transferred by the MDL to another district court.

The MDL has its authority to transfer "civil actions" for pre-trial proceedings under 28 U.S.C. § 1407. The MDL has recognized the bankruptcy stay against bankrupt defendants before it and those claims that have been stayed remain stayed in the transferee court of the MDL. *In re Asbestos Prod. Lia. Lit.*, 771 F.Supp. 415, 421, note 6 (J.P.M.L. 1991). The MDL Panel has noted that the transferee court should coordinate with the concerned bankruptcy courts. 771 F.Supp. at 421, n. 6. *In re Apex Oil Co.*, 980 F.2d 1150 (8th Cir. 1992) also recognized that the district court sitting in bankruptcy has the authority to fix the trial venue under Section 157(b)(5) or to abstain from the suits pending before the MDL transferee court. Based on these cases, this Court has authority over the cases before the MDL that are the subject of the Debtor's motion.

C. *If this Court does have jurisdiction, whether this Court must abstain or, alternatively, exercise its discretion to abstain pursuant to 28 U.S.C. § 1334(c).*

1. *Mandatory Abstention.*

A motion under section 157(b)(5), also requires an abstention analysis. *In re Pan American Corp.*, 950 F.2d 839, 844 (2nd Cir. 1991). The Tort Claimants' brief and other Claimants' objections and responses have moved that this Court abstain under 28 U.S.C. § 1334(c).

Section 157(b)(4) provides that "[n]on-core proceedings under § 157(b)(2)(B) of title 28 [liquidation of personal injury tort or wrongful death cases], shall not be subject to the mandatory abstention provisions of Section 1334(c)(2)." *In re Pan Am*, 950 F.2d at 845; 28 U.S.C. § 157(b)(4). This Court is exempted from mandatory abstention under Section 1334(c)(2).

2. *Discretionary Abstention.*

In their responses and at oral argument, the Claimants' attorneys urged that the Court abstain from transferring all of the breast implant cases involving the Debtor to the Eastern District of Michigan, specifically opposing the Debtor's proposition to hold one trial on the issue of causation for purposes of estimation. For the reasons more fully set forth below, the Court will not abstain its jurisdiction pursuant to 28 U.S.C. § 1334(c)(1) at this time. The Court will allow the Bankruptcy Court to proceed with the *estimation* process without holding the one causation trial requested by the Debtor.

Congress has indicated that courts should not be too quick to abstain from exercising their transfer powers under 28 U.S.C. § 157(b)(5). *In re Pan Am*, 950 F.2d at 845. Transfer should be the rule, abstention the exception. *Id.* The Court should weigh the advantages and disadvantages advanced at

the hearing. *A.H. Robins*, 788 F.2d at 1016. Factors enumerated by the *A.H. Robins* case, include:

> . . . some cases may be fully prepared and ready for state trial. Some cases may require substantial numbers of local witnesses. Claimants may be receiving critical medical, physical or psychological care in a local area which would have to be halted or transferred to Richmond. All of these factors are relevant.

Id. at 1016.

Issues of state law may also substantially affect the results in individual cases and must be considered. *Id.* The abstention doctrine manifests federal respect for State law and policy. *In re Pan Am*, 950 F.2d at 846. Section 1334(c)(1) of Title 28 of the United States Code provides for abstention by the district court in such instances:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. § 1334(c)(1). In *In re Pan Am*, the Court addressed two decisions by the district court involving its abstention from certain cases. *In re Pan Am* involved the Lockerbie air crash tragedy. The MDL panel had entered an order transferring all the federal cases to the Eastern District of New York. The *Pan Am* defendants subsequently filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code. All actions against the debtors were stayed by 11 U.S.C. § 362. Shortly thereafter, the *Pan Am* defendants moved for an order pursuant to 28 U.S.C. § 157(b)(5) transferring the Florida state-court actions, known as the "Coker" and the "Rosenkranz" actions to the Southern District Court of New York, where the bankruptcy proceeding was filed. The Pan Am debtors contemplated that the transfer to the Southern District of New York would be followed by another trans-

fer to the Eastern District of New York where the MDL was pending. The District Court in the Southern District of New York decided to abstain from exercising the court's transfer powers in both cases. On appeal, the Second Circuit reversed the district court's decision as to the Coker decision because the district court's actions were based on improper considerations. The Second Circuit held that the Coker action involved federal law questions, which could not be a basis for abstention. The Second Circuit, however, affirmed the district court's decision with regards to the Rosenkranz state court action because the Court found that the two-step transfer plan would engender further delay and expense. The debtors in the *In re Pan Am* case did not seek transfer of the cases already before the MDL to the district court where the bankruptcy was pending.

The issue of abstention in relation to the MDL arose in *In re Apex Oil Co.*, *supra*. There, the Court affirmed the district court's decision to abstain while the claimants' lawsuits proceeded in the multidistrict transferee court. The debtors in Apex had filed Chapter 11 bankruptcy in the Eastern District of Missouri. Acting under the authority of 28 U.S.C. § 1334(c)(1), the district court abstained from trying the claims, reasoning that the MDL had transferred the claims to the Eastern District of Pennsylvania. The bankruptcy stay was lifted so that the claimants could pursue their claims in the Eastern District of Pennsylvania. In *Apex*, the appellants claimed that the MDL had authority to transfer "lawsuits" only, but not bankruptcy claims, and that the district court's conclusion that their "claims" had been transferred was flawed. Reviewing that decision, the Eighth Circuit found that the distinction between lawsuits and claims does not negate the fact that the district court had the statutory authority to abstain while the claimants' lawsuits proceeded in the multidistrict transferee court. The Court wrote: "[e]ven though the 'claims' themselves may not have been transferred, we are not convinced that the district court should therefore be obliged to conduct duplicative proceedings in Missouri, thus

squandering the very economies which are the purpose of the multidistrict transfer." 980 F.2d at 1153. The District Court's order requiring all claimants to proceed against the debtors in the MDL court in Pennsylvania was also affirmed, the Eighth Circuit reasoning that it served the same purpose as the original order requiring multidistrict coordination of the other related cases.

The relationship between sections 157(b)(5) and 1334(c)(1), the abstention statute, was addressed by the Sixth Circuit in *In re White Motor Credit*, 761 F.2d 270 (6th Cir. 1985). The Sixth Circuit stated that in liquidating tort cases in bankruptcy, the district court should first decide whether to leave the cases with claims in the bankruptcy court in the courts where they are pending. If the Court decides against this course, the district court must then try the cases itself or send them to the federal court for the district in which they arose. *Id.* at 273. In *White Motor*, a confirmed plan of reorganization had already been established and only liquidation of damages was needed. The Sixth Circuit analysis is instructive in the instant case, even though the estimation process has not begun.

The Debtor contends that the estimation process would be more accurate if a causation trial was held first. Claimants offer that the estimation process could be accomplished within 60 days. They argue that the estimation process can be guided by the outcome of several actual trials already held as well as the number and value of cases previously settled with the Debtor. The Claimants further assert that valuation of the various types of cases by diseases and injuries already exists as a result of the Global Settlement in the breast implant cases. One causation trial is not needed for the estimation process where information already exists to accomplish the estimation process. The estimation should proceed before trial.

At oral argument, the Official Committee of Unsecured Creditors, arguing in favor of the transfer of all breast implant cases so that one causation trial can be held for the purpose of

estimation, addressed four cases for the Court to use as a guide for this proposition. Cited as a model for the causation trial is *In re Bendictin Litigation*, 857 F.2d 290 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989). In that case, the Sixth Circuit affirmed the district court's trifurcation of the issues involving a products liability action. Although the Sixth Circuit affirmed the decision to hold one trial on the causation only, the *Bendictin* case did not involve a bankruptcy claim and the estimation of certain unliquidated, contingent claims from personal injury tort claims.

A second case cited in support of the Debtor's position is *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2nd Cir. 1992). In that case, the district court approved a settlement agreement involving the debtor and a mandatory non-opt-out class of claimants. However, there was no issue of one causation trial for the purpose of estimation in that case. The *Drexel* case involved a settlement agreement pending confirmation of the debtor's reorganization plan. A causation trial was not involved in order to estimate the unliquidated and contingent claims in that case. It should also be noted that the *Drexel* case does not involve personal injury or wrongful death claims.

The third case is *Celotex Corp. v. Edwards*, 115 S.Ct. 1493, 1498-1499 (1995). The *Celotex* case only addresses the issue of whether or not the execution of a supersedeas bond based on a judgment in one district court is related to the debtor's bankruptcy pending in another district court. The case did not involve the issue of a causation trial held for the purpose of estimation.

The *A.H. Robins, supra*, is cited as the fourth case in favor of the transfer of cases and one causation trial for the purposes of estimation. In *A.H. Robins*, the Court noted that the bankruptcy court is not relieved of its duty in a Chapter 11 proceeding to estimate those contingent claims despite Section 157(b)(5) and before a trial is commenced. 788 F.2d at 1012. The Third Circuit stated:

Section 157(b)(2)(B) excepts from the definition of 'core proceedings' personal tort claims against the debtor. The bankruptcy court is without authority under the Act over 'the liquidation or estimation of contingent or unliquidated personal injury or wrongful death claims against the estate for purposes of distribution under Title 11' 28 U.S.C. § 157(b)(2)(B). (Italics added) It will be observed, however, that the statute denies authority to the bankruptcy court to 'estimate' contingent claims only if the purpose is to make a 'distribution' of the assets of the debtor; the statute does not in express terms deny to the bankruptcy court the authority, or relieve it of the duty, to 'estimate' the contingent 'personal injury' claims for purposes of determining the feasibility of a reorganization. And such has been the construction of the statute which has been adopted by the courts which have had to face the issue, the two leading cases being proceedings arising out of the asbestos litigation. (cites omitted) Both of these cases hold that estimations of the debtors' potential personal injury tort liabilities as an incident of the development of a plan of reorganization are core proceedings within the bankruptcy court's jurisdiction and that such estimations are not foreclosed by Section 157(b)(5) of the Act. (footnote omitted)

This is not to say the personal claimants in this proceeding will not be ultimately entitled, if they elect to do so, to have a jury trial of their claim in the district court. Section 157(b)(5) gives them that right. But, even though the tort claimants may be entitled to their jury trials, the bankruptcy court *is not relieved of its duty in a Chapter 11 proceeding to estimate those contingent claims.* The real question thus arises as to which proceedings takes precedence, whether the estimation by the bankruptcy court of the claims or the jury trials in the district court of the claims. The authorities which have considered this question in connection with a complicated products liability situation such as this are all unanimous. *The esti-*

> *mations of the potential and pending claims by the bankruptcy courts should precede any trials of the claims.*

788 F.2d at 1012 (emphasis added). Contrary to the proponents of the Debtor's motion to transfer and to hold a one causation trial for purposes of estimation, the *A.H. Robins* case states that the estimation process should occur first before any trials are held. The *A.H. Robins* court approved the district court's "tentative" order fixing the venue in the district court sitting in bankruptcy for all these claims. This Court finds the language in *A.H. Robins* does not foreclose this Court from ordering one or more causation trials to take place prior to the conclusion of the estimation process should the estimation process stall or if there is a need to test the accuracy of the estimation. Upon request of the Debtor. Claimants and/or the Bankruptcy Court this Court would entertain a subsequent motion to assist the estimation process by holding one or several trials. However, the estimation process must move forward first.

The Third Circuit Court further noted that having the estimation first before the trials would benefit all the claimants:

> . . . If the claimants as a whole are to realize reasonable compensation for their claims, it is obviously in the interest of the class of claimants as a whole to obviate the tremendous expense of trying these cases separately. If the bankruptcy court could arrive at a fair estimation of the value of all the claims and submit a fair plan of reorganization based on such estimation, with some mechanism for dispute resolution and acceptable to all interested parties, great benefit to all the claimants could be achieved and the excessive expense of innumerable trials, stretching over an interminable time, could be avoided. (footnote omitted) . . .

In re A.H. Robins, 788 F.2d at 1013. In remanding the matter for further notice and hearing, the *A.H. Robins* court was

mindful of the importance in balancing the advantages and disadvantages of having the trial in one district court or leaving the case at the state level. 788 F.2d at 1014, 1016. This Court is mindful that one or more causation trials held during the estimation process for the purpose of assuring a more accurate estimation can best be accomplished if all cases pending against the Debtor are before one court, the district court where the bankruptcy is pending. Coordination is therefore assured.

The Court agrees with the finding in *A.H. Robins* that the Bankruptcy Court should first estimate the unliquidated, contingent tort injury claims before a trial is held. As the Claimants argue, the estimation process can be accomplished in a short period of time. The Debtor has the information needed to value the unliquidated tort injury claims.

The Court notes that both the Debtor and the Claimants agreed during oral arguments the one causation trial will not resolve all the issues between the Debtor and the Claimants. Issues including individual liability, rupture of implants, mechanical causation, and disfigurement would not be addressed if only one causation trial were held. Further trials will be needed to resolve these issues.

Pending trial or other resolution, any removed claims against the Debtor should be subject to the MDL panel and such claims will be transferred to the MDL Judge for pretrial purposes which should not be inconsistent with the automatic stay of the Bankruptcy Court currently in effect as to the claims against the Debtor Dow Corning. All parties agree that the bankruptcy stay applies to all claims involving the Debtor. Therefore, there is no need to physically transfer the records of all the cases involving the Debtor to this District at this time. The Court also notes that many of the cases involving the Debtor are currently before the MDL judge. There is no need to waste resources of the court system, the Debtor and the Claimants with the physical transfer of all the case records involving the Debtor either to this District or the MDL transferee court. The Court will rely on the judgment of the trans-

feree judge to request from the transferor district clerks or the parties whatever case files and docket sheets he needs. The Court is also aware that alternative resolutions of many of the claims will occur prior to the liquidation/trial phase of the Debtor's bankruptcy which would obviate the need for physical transfer of the case records to this District for trial. Section 157(b)(5) does not mandate that all tort actions must be tried in district court, but only those which are not otherwise settled. *In re A.H. Robins*, 788 F.2d at 1013, n. 17. The Court further notes that unilateral dismissal of claims against a debtor under Fed.R.Civ.P. 41, or its equivalent by agreement and with judicial approval, assists rather than interferes with goals of Chapter 11. Such actions do not violate the automatic stay. *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 852 F.Supp. 226, 228 (S.D.N.Y. 1994). The MDL judge may enter such orders consistent with this Court's opinion and order.

The Court's decision that the estimation process should proceed without physically transferring the case files for one causation trial does not divest this Court of original and exclusive jurisdiction over the bankruptcy action pursuant to 28 U.S.C. § 1334(a). Should the Bankruptcy Court need more information for estimation purposes or reach the liquidation phase, the Court may again consider the issue of one or more causation trials should any party to the bankruptcy action request the Court to do so.

D. *Whether the claims against Dow Chemical Co. and Corning, Inc. should also be transferred to this Court and whether said claims are "related to" the Debtor's bankruptcy proceedings.*

The Court has jurisdiction under 28 U.S.C. § 1334(b) to "all civil proceedings . . . related to cases under title 11." "Related to" jurisdiction includes actions involving non-debtors that could "conceivably" have an effect on the Debtor's bankruptcy case. *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984); *Robinson v. Michigan Consol. Gas*

Co. Inc., 918 F.2d 579, 583-584 (6th Cir. 1990). In a recent Supreme Court case, the Court addressed the "related to" jurisdiction of the Court:

> Congress did not delineate the scope of 'related to' jurisdiction, but its choice of words suggests a grant of some breadth. The jurisdictional grant in § 1334(b) was a distinct departure from the jurisdiction conferred under previous acts, which had been limited to either possession of property by the debtor or consent as a basis for jurisdiction. We agree with the views expressed by the Court of Appeals for the Third Circuit in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (1984), that 'Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate,' and that the 'related to' language of § 1334(b) must be read to give district courts (and bankruptcy courts under § 157(a)) jurisdiction over more than simple proceedings involving the property of the debtor or the estate.

Celotex Corp. v. Edwards, 115 S.Ct. 1493, 1498-1499 (1995).

As stated above, Dow Chemical and Corning, Inc. are each 50% shareholders ("Shareholders") of Dow Corning. According to Dow Chemical and Corning, Inc., they meet the "related to" test under § 1334(b). First, any judgment entered either for, or against either or both of the Shareholders will directly impact the Debtor's assets in bankruptcy. Any judgments against the Shareholders would generate claims for contribution against the Debtor which would need to be resolved as part of the bankruptcy plan process. Any judgment for the Shareholders would likely extinguish that plaintiff's claim against Dow Corning based on collateral estoppel. Second, the Shareholders' litigation will inevitably affect Dow Corning's rights under the insurance coverage it shares with either Shareholder, thereby diminishing the insurance available to the Debtor to fund a plan of reorganization and

delaying the time that proceeds of insurance settlements will be available. Third, because it is the Debtor's product that will be on trial in any Shareholder litigation, the Debtor may claim it would need to participate actively in the defense and the costs of such participation would divert attention from the Debtor's reorganization both in terms of money and time.

In response, the Claimants assert that the Shareholders are large and healthy corporations that have no right to enjoy the protections afforded by bankruptcy. A bankruptcy filing does not bar an action against the principal of a debtor-corporation. *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1205 (3d Cir. 1991). The Claimants further assert that the contribution claim by the Shareholders against the Debtor is theoretical at this time. In *Pacor*, *supra*, the Court held that the actions against the non-debtor would have no effect on the debtor's bankruptcy estate and therefore is not "related to" bankruptcy within the meaning of section 1471(b).[1] 743 F.2d at 995. The Third Circuit stated:

> . . . At best, it is a mere precursor to the potential third party claim for indemnification by Pacor against Manville. Yet the outcome of the Higgins-Pacor action would in no way bind Manville, in that it could not determine any rights, liabilities, or course of action of the debtor. Since Manville is not a party to the Higgins-Pacor action, it could not be bound by res judicata or collateral estoppel. (cites omitted) Even if the Higgins-Pacor dispute is resolved in favor of Higgins (thereby keeping open the possibility of a third party claim), Manville would still be able to relitigate any issue, or adopt any position, in response to a subsequent claim by Pacor. Thus, the bankruptcy estate could not be affected in any way until the Pacor-Manville third party action is actually brought and tried.

Id. at 995. The Third Circuit went on to state that without a judgment against the non-debtor, there could never be a third

---

[1] Section 1471 is now 28 U.S.C. § 1334.

party indemnification claim against Manville. *Id.* The Claimants assert that a separate proceeding under 11 U.S.C. § 502 must be brought before the Bankruptcy Court if a judgment is rendered against the Shareholders.

Claimants state that if the real concern of the Shareholders is the fact that a certain insurance policy or policies are co-owned by the Debtor and Dow Chemical, then that issue should be brought to the Bankruptcy Court pursuant to *In the Matter of Vitek, Inc.*, 51 F.3d 530 (5th Cir. 1995). The Fifth Circuit in that case reversed the district court and affirmed the bankruptcy court's approval of certain settlements, finding that the bankruptcy court had jurisdiction over liability insurance policies where the debtor was a co-insured with other parties. The Fifth Circuit noted that a bankruptcy estate includes a debtor's interest in liability insurance under 11 U.S.C. § 541(a)(1). *In the Matter of Vitek*, 51 F.3d at 533.

In the instant case, as in Pacor, there will be no contingent claim by the Shareholders against the debtor for indemnification until such time as a judgment is rendered and, then, the non-debtors would still have to proceed with an entirely separate proceeding in order to obtain indemnification from the Debtor under 11 U.S.C. § 502. Joint tortfeasors are not indispensable parties in the federal forum. *Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194, 1198 (6th Cir. 1983). The Bankruptcy forum provides for a mechanism to resolve the Debtor's liability for indemnification should a judgment be rendered against the Shareholders.

The insurance issue raised by the Shareholders is under the jurisdiction of the Bankruptcy Court pursuant to 11 U.S.C. § 541. Section 541 gives the Bankruptcy Court broad discretion over the Debtor's interest in a liability insurance policy where the Debtor is a co-insured with a non-debtor third-party. *In the Matter of Vitek*, 51 F.3d at 533. Given that there has been no judgment entered against the Shareholders, the Shareholders have no claim pending against the insurance policy at this time and there are currently no competing inter-

ests involved for the insurance funds as between the Debtor and its coinsured.

As to the Shareholders' argument that judicial economy would best be served if the cases against them were joined with the cases against the Debtor, the *Pacor* court has stated that "judicial economy itself does not justify federal jurisdiction." *Pacor*, 743 F.2d at 994. This Court finds that judicial economy alone does not justify this Court exercising jurisdiction over the non-bankruptcy actions involving the Shareholders. The claims involving the Shareholders are not related to the bankruptcy action before the Court. The Court has no jurisdiction over those claims pursuant to 28 U.S.C. § 1334(b).

E. *Motions and Proposed Orders Dismissing the Debtor and/or Remanding claims involving Dow Chemical and Corning, Inc.*

Various Claimants in their responses to the Debtor's motion to transfer and during oral arguments indicate that there are motions and proposed orders seeking to dismiss or sever the Debtor and/or remand the claims involving Dow Chemical and Corning, Inc. currently pending either in the district court to which Dow Chemical and Corning, Inc. removed the cases or before the MDL judge.[2] Given this Court's ruling that it has no Jurisdiction over the claims involving the Shareholders, those motions and/or orders to dismiss or sever the Debtor and/or remanding the claims to the state court should be addressed by the district court in which those claims are currently pending or by Judge Pointer if the case has been transferred to the MDL court. Furthermore, claims against the Shareholders currently pending before a state court should no longer be removed to the U.S. District Court if the only basis for removal is under 28 U.S.C. § 1334(b).

---

[2] The Court notes that its July 5, 1995 Order Provisionally Transferring Certain Breast Implant Cases to this Court pending a hearing specifically stayed actions involving the Debtor, Dow Corning and did not stay any proceedings as to Dow Chemical or Corning.

III. *CONCLUSION*:

This Court finds it has jurisdiction over all the opt-out breast implant claims against the Debtor Dow Corning pursuant to 28 U.S.C. § 1334(a) and this Court does not exercise its discretion to abstain from this jurisdiction. The Court also has the sole authority to fix the trial venue for any personal injury trials in this matter pursuant to 28 U.S.C. § 157(b)(5). For the purpose of determining the trial venue of the breast implant cases or furthering the estimation process, the Court transfers the claims against the Debtor Dow Corning to this Court. However, the Court will not rule on the trial venue issue, at this time but will make that determination following the close of the estimation process. Pursuant to 28 U.S.C. § 157(b)(5), trial will either be here, in the district court in which the bankruptcy case is pending, or the district court in the district in which the claim arose as this Court may designate. The Court finds no physical transfer of case files or case records to the Eastern District of Michigan is necessary at this time and no such transfer should be made until further order of this Court.

Any removed claims against the Debtor will be subject to the MDL panel and such claims will be transferred to the MDL Judge for pretrial purposes only (the setting of the trial venue having been reserved by this Court) and such pre-trial proceedings shall not be inconsistent with the automatic stay of the Bankruptcy Court which is currently in effect as to the claims against the Debtor Dow Corning. Although Panel Rule 19(a) requires clerks of the transferor district courts to forward to the clerk of the transferee district court the complete original file and docket sheet for each transferred action, because of the voluminous files, the transferee MDL judge will determine whatever case files and docket sheets he needs from the transferor district clerks.

The Bankruptcy Court should proceed with its estimation process regarding these claims. However, a causation trial at this stage of the proceedings is not necessary. The Court does not foreclose its discretion or authority to hold such a trial or

trials at any point in the estimation process for the purpose of furthering or assisting the process should it be called upon to do so. Such motions should be addressed to this Court.

The Court finds it has no jurisdiction over the claims against the non-debtors Dow Chemical and Corning, Inc. and denies the Debtor's motion to transfer these claims. Claims against the non-debtors shall be remanded to state courts if the only basis for removal is the Court's "related to" jurisdiction. The Debtor Dow Corning shall be dismissed or may be severed from the claims against it and other non-debtor defendants in accordance with this opinion and claimants shall be allowed to proceed as scheduled against the non-debtors. Claims against the Debtor continue to be stayed pursuant to the automatic stay of the Bankruptcy Court.

Accordingly,

IT IS ORDERED that the Court has jurisdiction over all the opt-out breast implant claims against the Debtor Dow Corning pursuant to 28 U.S.C. § 1334(a) and is not exercising its discretion to abstain from this jurisdiction;

IT IS FURTHER ORDERED that the Court has the sole authority to fix the trial venue for any personal injury trials in this matter pursuant to 28 U.S.C. § 157(b)(5) and the Court GRANTS the Debtor's motion to transfer the opt-out breast implant cases for the purposes of setting the trial venue of the claims against the Debtor or furthering the estimation process if necessary. The Court will determine following the close of the estimation process, whether the trial venue of the personal injury tort claims, will be either in this Court, the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose pursuant to 28 U.S.C. § 157(b)(5);

IT IS FURTHER ORDERED that any removed claims against the Debtor will be subject to the MDL panel and such claims will be transferred to the MDL Judge for pre-trial purposes only (the setting of the trial venue having been reserved by

this Court) and such pre-trial proceedings shall not be inconsistent with the automatic stay of the Bankruptcy Court which is currently in effect as to the claims against the Debtor Dow Corning. Although Panel Rule 19(a) requires clerks of the transferor district courts to forward to the clerk of the transferee district court the complete original file and docket sheet for each transferred action, because of the voluminous files, the transferee MDL judge will determine whatever case files and docket sheets he needs from the transferor district clerks;

IT IS FURTHER ORDERED that no physical transfer of case files or case records to the Eastern District of Michigan should take place at this time nor until further order of this Court;

IT IS FURTHER ORDERED that the motion of the Debtor Dow Corning to transfer the breast implant cases for the purpose of holding one causation trial prior to the estimation process is DENIED without prejudice at this time, the Court reserving its authority to hold such a trial or trials to further the efforts of the estimation process;

IT IS FURTHER ORDERED that the Bankruptcy Court should proceed with an estimation process required by 11 U.S.C. § 502(c);

IT IS FURTHER ORDERED that the Debtor's motion to transfer the breast implant claims against the non-debtors Dow Chemical and Corning, Inc. to the Eastern District of Michigan is hereby DENIED;

IT IS FURTHER ORDERED that motions and proposed orders seeking to dismiss or sever the Debtor from claims against other breast implant defendants pending in either state courts or in federal district courts should be GRANTED and an order should be entered by those respective courts in accordance with this opinion and order;

IT IS FURTHER ORDERED that the claims against the non-debtors Dow Chemical and Corning, Inc. which have been

removed to federal district courts shall be REMANDED to the respective state courts if the only basis for removal is 28 U.S.C. §§ 1334(b) or 1367(a);

IT IS FURTHER ORDERED that the claims against the Debtor Dow Corning continue to be stayed pursuant to the automatic stay of the Bankruptcy Court until further order of the Bankruptcy Court;

IT IS FURTHER ORDERED that the time for removal of the opt-out breast implant claims pursuant to Bankruptcy Rule 9027(a)(2)(A) against the Debtor Dow Corning be enlarged to 30 days from the date of this Order or the Debtor Dow Corning may remove the claims 30 days after entry of an order terminating the stay pursuant to Bankruptcy Rule 9027(a)(2)(B);

IT IS FURTHER ORDERED that the MDL Judge may enter orders to remand, to dismiss and to sever any claims against non-debtors, including the Shareholders, in accordance with this Opinion and Order.

DATED: Sep 12 1995

/s/ DENISE PAGE HOOD
DENISE PAGE HOOD
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 95-CV-72397-DT

Sept. 12, 1995.

In Re: DOW CORNING CORPORATION,

Debtor.

MEMORANDUM OPINION AND ORDER ON THE NON-DEBTORS' MOTIONS TO TRANSFER

HON. DENISE PAGE HOOD, *District Judge.*

I. *INTRODUCTION/FACTS:*

This matter is before the Court on the non-debtors Medical Engineering Corporation/Bristol-Myers Squibb ("MEC Defendants"), Minnesota Mining and Manufacturing Company ("3M") and Baxter Healthcare Corp. and Baxter International, Inc.'s ("Baxter Defendants") motions to transfer breast implant cases to the United States District Court, Eastern District of Michigan. Responses were filed and a hearing was held on the matter.

On May 15, 1995, the Debtor, Dow Corning Corporation, sought a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code with the Bankruptcy Court of the United States District Court, Eastern District of Michigan, Northern Division in Bay City, before the Honorable Arthur J. Spector. On June 12, 1995, the Debtor filed a motion to transfer certain breast implant cases before the Bankruptcy

Court. Judge Spector entered a Determination and Report and Recommendation Regarding the Debtor's Motion to Transfer on June 13, 1995 indicating that the District Court had jurisdiction over this motion. The non-debtors, MEC Defendants, 3M, and Baxter Defendants also filed similar motions to transfer before the Bankruptcy Court. On July 5, 1995, this Court entered an order provisionally transferring the opt-out breast implant cases involving the Debtor only to the Eastern District of Michigan pending a hearing scheduled for the motion on July 31, 1995. The Court also scheduled the non-debtors' motions to transfer on the same date.

Plaintiffs have filed various causes of actions all over the United States against the non-debtors and movants, MEC Defendants, 3M and Baxter Defendants, alleging, *inter alia*, that the silicone breast implants manufactured by these companies, caused certain diseases and injuries. The non-debtor Defendants have also been sued, in some cases, as joint tortfeasors with the Debtor, naming the Debtor as the supplier of certain raw materials. They seek to have the actions against them transferred to this District along with the actions involving the Debtor, essentially so that the Court can hold one or more consolidated trials on the issue of causation only.

II. *ANALYSIS*:

A. *Whether the claims involving the non-debtors are "related to" the Debtor's bankruptcy proceedings under 28 U.S.C. § 1334(b).*

The district court has jurisdiction under 28 U.S.C. § 1334(b) to "all civil proceedings . . . related to cases under title 11." "Related to" jurisdiction includes actions involving non-debtors that could "conceivably" have an affect on the Debtor's bankruptcy case. *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984); *Robinson v. Michigan Consol. Gas Co. Inc.*, 918 F.2d 579, 583-584 (6th Cir. 1990). In a recent Supreme Court case, the Court addressed the "related to" jurisdiction of the Court:

> Congress did not delineate the scope of 'related to' jurisdiction, but its choice of words suggests a grant of some breadth. The jurisdictional grant in § 1334(b) was a distinct departure from the jurisdiction conferred under previous acts, which had been limited to either possession of property by the debtor or consent as a basis for jurisdiction. We agree with the views expressed by the Court of Appeals for the Third Circuit in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (1984), that 'Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate,' and that the 'related to' language of § 1334(b) must be read to give district courts (and bankruptcy courts under § 157(a)) jurisdiction over more than simple proceedings involving the property of the debtor or the estate.

In re Celotex Corp., 115 S.Ct. 1493, 1498-1499 (1995).

In *Pacor, supra*, the Court held that the actions against the non-debtor would have no effect on the debtor's bankruptcy estate and therefore are not "related to" bankruptcy within the meaning of section 1471(b).[1] 743 F.2d at 995. The Third Circuit stated:

> . . . At best, it is a mere precursor to the potential third party claim for indemnification by Pacor against Manville. Yet the outcome of the Higgins-Pacor action would in no way bind Manville, in that it could not determine any rights, liabilities, or course of action of the debtor. Since Manville is not a party to the Higgins-Pacor action, it could not be bound by res judicata or collateral estoppel. (cites omitted) Even if the Higgins-Pacor dispute is resolved in favor of Higgins (thereby keeping open the possibility of a third party claim), Manville would still be able to relitigate any issue, or

---

[1] Section 1471 is now 28 U.S.C. § 1334.

> adopt any position, in response to a subsequent claim by Pacor. Thus, the bankruptcy estate could not be affected in any way until the Pacor-Manville third party action is actually brought and tried.

Id. at 995. The Third Circuit went on to state that without a judgment against the non-debtor, there could never be a third party indemnification claim against Manville. *Id.* The Sixth Circuit also noted that any judgment received could not itself result in even a contingent claim against the debtor since an entirely separate proceeding to obtain indemnification must first be made. There is no automatic/contractual basis for indemnification between the non-debtor and the debtor. *Id.*

In the instant case, as in *Pacor*, there would be no contingent claim by the non-debtors against the Debtor for indemnification until such time as a judgment is rendered. Even then, the non-debtors would have to proceed with an entirely separate proceeding in order to obtain indemnification from the Debtor before the Bankruptcy Court. There has been no allegation that there is a contractual or automatic basis for indemnification between the non-debtors and the Debtor. Nor has there been any assertion that the non-debtors have filed any crossclaims against the Debtor. Even if crossclaims were filed by the non-debtors against the Debtor, those claims could be severed and the matter could proceed as to the non-debtors.

The non-debtors have asserted that judicial economy should be a concern for the Court. The *Pacor* court addressing judicial economy wrote:

> On the other hand, the mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate does not bring the matter within the scope of section 1471(b). Judicial economy itself does not justify federal jurisdiction. (cites omitted) '[J]urisdiction over non-bankruptcy controversies with third parties who are oth-

> erwise strangers to the civil proceeding and to the parent bankruptcy does not exist.' (cites omitted).

Pacor, 743 F.2d at 994. This Court finds that judicial economy would not be attained by having one or more causation trial on the issue of disease involving the non-debtors because there appear to be other issues involved that need to be tried subsequent to the causation trial, i.e., mechanical causation and punitive damages. This Court further finds that judicial economy alone does not justify this Court obtaining jurisdiction over the non-bankruptcy actions involving the non-debtors. The claims against the non-debtors are not related to the bankruptcy action before the Court and the Court has no jurisdiction over those claims pursuant to 28 U.S.C. § 1334(b).

B. *Whether the Court possesses supplemental jurisdiction under 28 U.S.C. § 1367(a).*

The non-debtors cite *In re Cuyahoga Equip. Corp.*, 980 F.2d 110 (2d Cir.1992) to support their argument that this Court possesses supplemental jurisdiction over the actions against the non-debtors pursuant to 28 U.S.C. § 1367(a). In that case, the court stated:

> The district court's authority to approve the settlement, with respect to the environmental causes of action, could properly be founded on its supplemental jurisdiction. Given an independent jurisdiction source like that provided by § 1334(b), federal courts possess supplemental jurisdiction over related claims. See 28 U.S.C.A. § 1367(a) (West Supp. 1992) ("[T]he district courts shall have supplemental jurisdiction over all other claims that are *so related to* claims in [an] action within [a court's] original jurisdiction that they form part of the same case.") In the case at hand, the environmental causes form part of the same case with the bankruptcy claims because all of them, resolved in the settlement agreement, concern the government's attempts to remedy haz-

> ardous substance releases at the Publicker site and they remain intertwined in the competing parties' efforts to secure a share of the proceeds of the option sale. Even without an independent source of jurisdiction over the environmental actions, § 1367(a) therefore vested the Southern District with jurisdiction over them as related claims forming part of the same case pending before it. (cites omitted) (emphasis added).

Id. at 115. The Court notes that this appears to be the only circuit case which addresses supplemental jurisdiction under Section 1367 involving a bankruptcy. *In the Matter of Walker*, 51 F.2d 562, 572 (5th Cir. 1995). The Fifth Circuit noted that the Second Circuit "did not rest on § 1367 alone, noting that '[t]he district did not need to rely solely on its supplemental jurisdiction to approve the settlement, because additional authority arises from CERCLA's jurisdictional grant. . . .' " (cites omitted). 51 F.2d at 572, n. 8. Section 1367 also uses the "related to" language in order for a court to exercise jurisdiction over an action.

Given the facts in the instant case, this Court finds that it does not have supplemental jurisdiction over the claims against the non-debtors. The breast implant actions against the non-debtors are not "so related" to the bankruptcy action that "they form part of the same case." In the *In re Cuyahoga* case, the Second Circuit found that the environmental causes formed part of the bankruptcy claims because those claims remained "intertwined in the competing parties' efforts to secure a share of the proceeds of the option sale." 980 F.2d at 115. Here, the non-debtors have not shown that the claims against them are so "intertwined" with the Debtor's interests in the bankruptcy action. The Court finds that it has no supplemental jurisdiction over the claims involving the non-debtors that do not involve the Debtor.

Since this Court has ruled that it does not have jurisdiction over the claims against the non-debtors, the Court will not address the abstention issue in detail. The Court incorporates by reference its analysis of the abstention issue in its

Memorandum Opinion and Order on the Debtor's Motion to Transfer.

C. *Motions and Proposed Orders Dismissing the Debtor and/or Remanding Claims involving the Non-Debtors Currently Pending.*

Various Claimants in their responses to the non-debtors' motions to transfer and during oral arguments indicate that there are motions and proposed orders seeking to dismiss or sever the Debtor and/or remand the claims involving the non-debtors currently pending either in the district court to which the non-debtors removed the matter or before the Multi District Litigation Panel ("MDL") judge, the Honorable Sam C. Pointer in the Northern District of Alabama.[2] Given this Court's ruling that it has no jurisdiction over the non-debtors' claims, those motions and/or orders to dismiss or sever the Debtor and/or remanding the claims to the state court should be addressed by the district court where those causes of actions are currently pending or by Judge Pointer if that case has been transferred to the MDL court. Claims against the non-debtors currently pending before a state court must not be removed to the U.S. District Court if the only basis for removal is under 28 U.S.C. § 1334(b) or § 1367(a).

Accordingly,

IT IS ORDERED that the non-debtors Medical Engineering Corporation/Bristol-Myers Squibb, Minnesota Mining and Manufacturing Company and Baxter Healthcare Corp. and Baxter International, Inc.'s motions to transfer breast implant cases to the Eastern District of Michigan are hereby DENIED;

---

[2] The Court notes that its July 5, 1995 Order Provisionally Transferring Certain Breast Implant Cases to this Court pending a hearing specifically stayed actions involving the Debtor, Dow Corning and did not stay any proceedings as to the non-debtors.

IT IS FURTHER ORDERED that motions and proposed orders seeking to dismiss or sever the Debtor and/or remand the claims involving the non-debtors back to state court currently pending either in the district court to which the non-debtors removed the matter or before the MDL judge, should be granted by that Court in accordance with this Court's opinion; and

IT IS FURTHER ORDERED that the non-debtors are ENJOINED from removing any claims against all the non-debtors currently pending before a state court to the United States District Court if the only basis for removal is under 28 U.S.C. § 1334(b) or § 1367(a).

Dated: Sep 12 1995

/s/ DENISE PAGE HOOD
Denise Page Hood
United States District Judge

Appendix D

UNITED STATES COURT OF APPEALS,
FOR THE SIXTH CIRCUIT.

Nos. 95-2034/2082/2084/2106/2107
Filed June 3, 1996
LEONARD GREEN, Clerk

IN RE: DOW CORNING CORPORATION,

Debtor.

HEIDI LINDSEY, REP. OF CHARLOTTE MAHUM AND CHERYL KAHN, *ET AL.*,

Plaintiffs,

OFFICIAL COMMITTEE OF TORT CLAIMANTS; *ET AL.*,

Plaintiffs-Appellees,

—v.—

O'BRIEN, TANSKI, TANZER AND YOUNG HEALTHCARE PROVIDERS OF CONNECTICUT, *ET AL.*,

Defendants,

DOW CORNING CORPORATION, *ET AL.*,

Defendants-Appellants.

Before:

MARTIN and BATCHELDER, *Circuit Judges*
WISEMAN,* *District Judge.*

---

* Hon. Thomas A. Wiseman, Jr., Senior United States District Judge for the Middle District of Tennessee, sitting by designation.

ORDER

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original hearing panel.

This panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

This panel is, however, issuing an amended opinion in which we adhere to the April 9, 1996 decision in this case, but seek to clarify the scope of the ruling and the impact it is intended to have. The opinion is therefore amended and reissued as follows. Mandate to issue immediately.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Leonard Green, Clerk

Nos. 96-330, 96-742

Supreme Court, U.S.
FILED
NOV 27 1996
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

OFFICIAL COMMITTEE OF TORT CLAIMANTS, et al.,
Petitioners,
v.
DOW CORNING CORPORATION, et al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY AND CORNING INCORPORATED IN OPPOSITION

HERBERT L. ZAROV
JOHN E. MUENCH
JAMES C. SCHROEDER
THERESA A. CANADAY
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

Counsel for The Dow Chemical Company

BARBARA J. HOUSER
Counsel of Record
GEORGE H. TARPLEY
Sheinfeld, Maley & Kay P.C.
1700 Pacific Avenue, Suite 4400
Dallas, TX 75201-4618
(214) 953-0700

Counsel for Dow Corning Corporation

WILLIAM D. EGGERS
Nixon Hargrave Devans & Doyle LLP
P.O. Box 1051, Clinton Square
Rochester, NY 14603
(716) 263-1000

Counsel for Corning Inc.

31 pp

QUESTIONS PRESENTED

1. Whether this Court should review the Sixth Circuit's ruling on the motion to transfer when no cases have yet been transferred and the district court's second denial of transfer is currently the subject of another appeal now pending in the Sixth Circuit.

2. Whether litigation against non-debtors is "related to" a bankruptcy only when a judgment against the defendant in that litigation would result in the automatic creation of contribution or indemnity liability against the debtor.

3. Whether district courts, in exercising the power to fix trial venue provided in 28 U.S.C. § 157(b)(5), may transfer, to the district where a bankruptcy is pending, cases related to the bankruptcy.

RULE 29.6 STATEMENT

The Dow Chemical Company and Corning Incorporated each own 50% of Dow Corning Corporation. The following is a list of nonwholly owned subsidiaries of Dow Corning Corporation:

Devonshire Underwriters Limited
Dow Corning de Argentina S.A.I.C.
Dow Corning de Brazil LTDA
Dow Corning de Colombia, S.A.
Dow Corning de Mexico S.A. de C.V.
Dow Corning de Venezuala S.A.
Dow Corning Chile S.A.
Dow Corning Taiwan Inc.
Dow Corning Thailand Ltd.
Dow Corning Construction S.A.
DC STI S.A.
Dow Corning France S.A.
Dow Corning Investment S.A.
Dow Corning Coordination Center S.A.
Dow Corning Limited
Dow Corning S.A.
Dow Corning STI Limited
DC Krafft S.A.

The Dow Chemical Company has no parent company. The following is a list of nonwholly owned subsidiaries of The Dow Chemical Company:

Destec Energy, Inc.

Corning Incorporated has no parent company. The following is a list of nonwholly owned subsidiaries of Corning Incorporated:

Corning Incorporated Foreign Sales Corporation
Corning France, S.A.
Corning Japan K.K.

Corning Asahi Corporation
Corning Asahi Video Products Company
Iwaki Corning (M) SDN BHD
Dominique Dutscher, S.A.
Siecor Corporation
Siecor Mexico S.A. de C.V.
Siecor S.A. de C.V.
Associated Clinical Laboratories L.P.
CORNING SciCor Limited Partnership
CORNING Bio Inc.
Pathology Building Partnership
CALP S.p.A.
EuroKera S.N.C.
Keraglass
Morgane S.A.
Samcor Glass Limited
Sicover, S.A.
Siecor GmbH
Siecor GmbH & Co. KG
International Hau-Mei Glass Engineering Co., Ltd.
Optical Waveguides Australia Pty. Ltd.
Pittsburgh Corning Europe N.V.
Pittsburgh Corning (U.K.) Ltd.
Shanghai Corning Engineering Corporation Ltd.
Optical Fibres
Samsung-Corning Co., Ltd.
Samsung Corning Company (Malaysia) SDN BHD
N-Cor, Ltd.
ACOR Programs, Inc.
CeraMem Separations, Inc.
Cormetech, Inc.
American Video Glass Company
Watkins Glen International, Inc.
Corporate Venture Partners
Samsung Corning Precision Glass Co., Ltd.
Corsam Glasstec R&D Center

Doan Associates
Eurokera North America, Inc.
Fairfield Venture Partners II, L.P.
Fiber Sensys, Inc.
Molecular Simulations, Inc.
MDL Information Systems, Inc.
Pittsburgh Corning Corporation
U.S. Conec, Ltd.
Steuben Partners, L.P.
Surgical Eye Enterprises L.P.
Surgical Eye Institute L.P.
Clinical Pathology Institute
Nevillewood L.P.
Pharmakon Research & Development
Hazleton Clinical Research Institute Inc.
Bio-Imaging Technologies, Inc.
Quanterra Incorporated
Home Access Health Corp.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT 1

A. Background. 1

B. Dow Corning's Shared Insurance With Dow Chemical And Corning. 3

C. The Proceedings Below. 4

D. Subsequent Proceedings. 6

REASONS FOR DENYING THE PETITIONS 7

I. RECENT DEVELOPMENTS IN THIS CASE MAKE REVIEW COMPLETELY UNNECESSARY. 7

II. THE SIXTH CIRCUIT'S RULING ON "RELATED TO" JURISDICTION IS CORRECT AND DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS. 9

TABLE OF CONTENTS—Continued

III. THE SIXTH CIRCUIT'S RULING THAT THERE IS A POWER TO TRANSFER UNDER § 157(b)(5) IS CORRECT AND IS CONSISTENT WITH DECISIONS OF OTHER COURTS OF APPEALS. . . 16

CONCLUSION 19

TABLE OF AUTHORITIES

Cases: *Page*

A.H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986) 6, 7, 16, 17, 18

American Constr. Co. v. Jacksonville, T. & K.W. Ry., 148 U.S. 372 (1893) 8

Artiglio v. Corning Inc., 56 Cal. Rptr. 2d 877 (App. 1996) 2

Bendectin Litig., In re, 857 F.2d 290 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989) 13

Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R., 389 U.S. 327 (1967) 9

Celotex Corp. v. Edwards, 115 S.Ct. 1493 (1995) . . . 11, 12, 15

Cuyahoga Equip. Corp., In re, 980 F.2d 110 (2d Cir. 1992) 12

Fedpak Systems, Inc., In re, 80 F.3d 207 (7th Cir. 1996) 9

G.S.F. Corp., In re, 938 F.2d 1467 (1st Cir. 1991) 10

Guild & Gallery Plus, Inc., In re, 72 F.3d 1171 (3d Cir. 1996) 11

TABLE OF AUTHORITIES—Continued

Page

Home Ins. Co. v. Cooper & Cooper, Ltd., 889 F.2d 746 (7th Cir. 1989) 10

Jenkins v. Raymark Industries, Inc., 782 F.2d 468 (5th Cir. 1986) 13

Marcus Hook Development Park, Inc., In re, 943 F.2d 261 (3d Cir. 1991) 11

Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984) 10

Pan Am Corp., In re, 16 F.3d 513 (2d Cir. 1994) . . . 17

Pan Am Corp., In re, 950 F.2d 839 (2d Cir. 1991) . . 18

Patterson v. Shumate, 504 U.S. 753 (1992) 18

Silicone Gel Breast Implants Prods. Liab. Litig., In re (MDL 926), 793 F. Supp. 1098 (J.P.M.L. 1992) 5, 15

Silicone Gel Breast Implants Prods. Liab. Litig., 887 F. Supp. 1455 (N.D. Ala. 1995) 14

United States Lines, In re, 128 B.R. 339 (S.D.N.Y. 1991) 17

Virginia Military Institute v. United States, 508 U.S. 946 (1993) 8

TABLE OF AUTHORITIES—Continued

Page

Wolverine Radio Co., In re, 930 F.2d 1132 (1991), *cert. dismissed*, 503 U.S. 978 (1992) 11

Wood, In re, 825 F.2d 90 (5th Cir. 1987) 10

Zerand-Bernal Group v. Cox, 23 F.3d 159 (7th Cir. 1994) 12

Statutes: *Page*

28 U.S.C. § 157(b)(2)(B) 18

28 U.S.C. § 157(b)(5) 4, 6, 7, 16, 17, 18, 19

28 U.S.C. § 1254(a) 1

28 U.S.C. § 1292(b) 14

28 U.S.C. § 1334(b) 4, 5, 7, 11, 12, 15, 16

28 U.S.C. § 1334(c)(1) 16

28 U.S.C. § 1452(a) 4

Miscellaneous: *Page*

J. Sanchez-Guerrero, et al., *Silicone Breast Implants nad the Risk of Connective-Tissue Diseases and Symptoms*, 332 NEW ENG. J. MED. 1666 (1995) 2

TABLE OF AUTHORITIES—Continued

Page

Marcia Angell, *Science on Trial: The Clash of Medical Evidence and the Law in the Breast Implant Case* (1996) 2

Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* (7th ed. 1993) 16

BRIEF FOR DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, AND CORNING INCORPORATED IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a[1]) is reported at 86 F.3d 482. The opinions of the district court (Pet. App. 29a-56a and 57a-64a) are reported at 187 B.R. 919 and 187 B.R. 934 respectively.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1996. The petitions for rehearing were denied on June 3, 1996. Pet. App. 65a. The petitions for writ of certiorari were filed on August 28, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. Background.

Dow Corning Corporation ("Dow Corning" or "the debtor") is a leading manufacturer of silicone industrial products. Along with its subsidiaries, Dow Corning sells more than 8,700 products, nearly all of which are made from silicones or otherwise incorporate silicone technologies. C.A. App. 3033. In 1991, the peak year for sales of Dow Corning's breast implant products, silicone gel breast implants constituted less than 1% of Dow Corning's total sales. *Ibid.*

Studies by disinterested scientists have consistently found no connection between silicones and disease. See Marcia

---

[1] References in this brief to "Pet." and "Pet. App." are to the Petition and attached Appendices filed by the Official Committee of Tort Claimants in No. 96-330. The petition filed in No. 96-742 is cited as "O'Quinn Pet."

Angell, *Science on Trial: The Clash of Medical Evidence and the Law in the Breast Implant Case* 195-197 (1996) ("several good epidemiologic studies have failed to show an association between implants and a host of connective tissue diseases, symptoms, and abnormal lab tests. * * * The best evidence now is a relative risk of 1.0, indicating no contribution of implants to disease").[2] Nonetheless, tens of thousands of recipients of Dow Corning's breast implants have sued in recent years, claiming to have contracted various diseases as a result of the silicones in their implants. Pet. App. 3a.

In thousands of these cases, the plaintiffs have sued not only Dow Corning, but also its corporate parents, The Dow Chemical Company ("Dow Chemical") and Corning Incorporated ("Corning") (collectively the "Shareholders"), even though neither Dow Chemical nor Corning designed, manufactured, tested, or sold breast implants. *Id.* at 4a-5a. The Shareholders, in turn, have each asserted cross-claims against Dow Corning for indemnity and contribution. *Id.* at 13a; C.A. App. 2028, 2135-2140. All of the claims against

---

[2] Dr. Angell is executive editor of *The New England Journal of Medicine*. See also, *e.g.*, J. Sanchez-Guerrero, et al., *Silicone Breast Implants and the Risk of Connective-Tissue Diseases and Symptoms*, 332 NEW ENG. J. MED. 1666, 1670 (1995) (Harvard Medical School study concluding that "we found no evidence of an association between silicone breast implants and either connective-tissue diseases defined according to a variety of standardized criteria or signs or symptoms of connective-tissue disease"). Petitioners' allegations about the testing and safety of silicones (Pet. 4-5) are wildly inaccurate and inconsistent with all of the responsible scientific studies performed in recent years. See generally *Artiglio v. Corning Inc.*, 56 Cal. Rptr. 2d 877 (App. 1996) (describing tests on silicone compounds and holding that there is no basis to impose liability on Dow Chemical or Corning).

the Shareholders are brought by plaintiffs who are also asserting the same claims against the debtor, seeking recovery for the same alleged injuries resulting from the same products — the debtor's implants. C.A. App. 2027-2133, 3035-3036, 3049-3050. Thus, all of the cases against the debtor and its Shareholders raise the same threshold issue — do Dow Corning's implants cause disease, as the tort claimants assert? [3] C.A. App. 107, 2028, 2032-2133. Throughout this litigation, Dow Corning and its Shareholders have suggested that the federal courts keep open the option of eventually holding a single trial to resolve this common, potentially dispositive, question. *E.g.*, C.A. App. 198-206, 1181-1193, 1203-1207, 1215-1216.

B. Dow Corning's Shared Insurance With Dow Chemical And Corning.

For many years, Dow Corning shared insurance coverage with Dow Chemical and Corning under a substantial number of liability insurance policies. As the court of appeals noted, Dow Corning's interest in these policies and their proceeds constitutes "one of the largest assets of [the] bankruptcy estate"; the policies have total aggregate coverage limits of more than $1 billion. Pet. App. 21a.

The court of appeals held — and petitioners do not contest in this Court — that if the claims against Dow Chemical and Corning proceed "separate[ly]," the debtor's "insurance coverage may be eviscerated when the proceeds are eventually distributed." Pet. App. 23a. This could occur because settlements or judgments paid by the Shareholders, or defense expenses incurred by the Shareholders, are reim-

---

[3] Some cases include claims that implants have ruptured or leaked, but those cases also allege uniformly that the implants cause disease.

bursed by joint insurance proceeds that would otherwise be part of the debtor's estate. *Id.* at 22a-23a.

C. The Proceedings Below.

Shortly after its Chapter 11 filing, Dow Corning moved under 28 U.S.C. § 157(b)(5) to transfer to the Eastern District of Michigan, where its bankruptcy case is pending, all pending breast implant claims involving Dow Corning implants — that is, all of the claims against Dow Corning and its Shareholders. Dow Chemical and Corning joined in that motion. Pet. App. 4a-5a. The motion to transfer covered claims that were in federal court under diversity jurisdiction, as well as claims that had been, or were in the process of being, removed from state courts pursuant to the bankruptcy removal statute, 28 U.S.C. § 1452(a). *Ibid.*

In September 1995, the district court granted the transfer motion as to the claims against the debtor, but refused to transfer the claims against the Shareholders, ruling that the latter claims were not "related to" the debtor's bankruptcy case. Pet. App. 29a; see 28 U.S.C. § 1334(b) ("the district courts shall have original but not exclusive jurisdiction of all civil proceedings * * * related to cases under title 11"). In so ruling, the district court expressly noted that

> one or more causation trials held during the estimation process for the purpose of assuring a more accurate estimation can best be accomplished if all cases pending against the Debtor are before one court, the district court where the bankruptcy is pending.

Pet. App. 47a. The court indicated that it would remain open to the possibility of having a common issues trial at some point in the future, *id.* at 48a, 53a-54a, and in the meantime, transferred the claims against the debtor to Judge Pointer in the Northern District of Alabama for consolidated

pretrial proceedings, subject to the Bankruptcy Code's automatic stay. *Id.* at 47a. Pursuant to an order of the Multidistrict Litigation Panel, Judge Pointer has been overseeing all of the federal breast implant cases since 1992, including claims against the debtor and its Shareholders. *In re Silicone Gel Breast Implants Prods. Liab. Litig. (MDL 926)*, 793 F. Supp. 1098 (J.P.M.L. 1992).

The Sixth Circuit reversed the district court's refusal to transfer the claims against the Shareholders. First, the court held that contribution or indemnity claims that may be brought against the debtor were "contingent claims against Dow Corning" that "obviously would affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as Dow Corning's ability to resolve its liabilities and proceed with reorganization." Pet. App. 20a.

Second, the court of appeals gave an "additional" reason for finding "related to" jurisdiction under § 1334(b) with respect to the claims against the Shareholders. Pet. App. 21a. The court held that there was a significant risk that the Shareholders would be "able to assert mature, liquidated claims against the [joint] insurance proceeds if litigation pending against them is permitted to go forward." *Id.* at 22a, 23a. As a result, the court held that the joint insurance proceeds available to the debtor may be substantially depleted when those proceeds are ultimately distributed. *Id.* at 21a, 23a. Indeed, the court of appeals noted that

> certain of the policies cover defense expenses, and those costs alone may significantly reduce the pool of coverage available to Dow Corning if the claims pending against Dow Chemical and Corning Incorporated are allowed to proceed separately.

Id. at 23a.

The Sixth Circuit also concluded that district courts have the power, under 28 U.S.C. § 157(b)(5), to fix trial venue for claims "related to" the bankruptcy in the district where the bankruptcy is pending. *Id.* at 23a-26a. In so holding, the court followed the Fourth Circuit's decision in *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986), another mass tort case. In *Robins*, the Fourth Circuit held that claims related to a bankruptcy case could be centralized in one forum under § 157(b)(5); this provided an opportunity for adoption of a "mechanism for dispute resolution" that would obviate the need for "innumerable trials, stretching over an interminable time" and would avoid the "stupendous costs that would be involved if all the claims here had to be tried." 788 F.2d at 1013 (quoted at Pet. App. 25a-26a).

D. Subsequent Proceedings.

On remand from the Sixth Circuit's decision, the district court, in an order entered on July 30, 1996, again declined to transfer the claims against the Shareholders, this time on the ground that it would abstain from hearing those claims. Dow Corning and its Shareholders have appealed from this order. That appeal is currently pending in the Sixth Circuit. *In re Dow Corning Corp.*, Nos. 96-2005, 96-2008, 96-2009, 96-2010, 96-2011, 96-2012, 96-2013, 96-2139 (consolidated) (6th Cir.).

In the MDL case, Judge Pointer has continued to preside over a host of ongoing pretrial matters. In addition to coordinating discovery efforts and other pretrial activity, Judge Pointer has recently appointed a panel of neutral experts, pursuant to Fed. R. Evid. 706, to evaluate and critique the pertinent scientific literature and studies. *In re Silicone Gel Breast Implant Prods. Liab. Litig. (MDL 926)*, Order Nos. 31 (May 30, 1996), 31A (June 10, 1996), and 31B (June 13, 1996). (Dow Corning had previously moved

in the bankruptcy court for appointment of a Rule 706 panel. The bankruptcy judge has not yet ruled on Dow Corning's request.)

REASONS FOR DENYING THE PETITIONS

The questions presented in the petitions clearly do not warrant this Court's review. The most obvious reason is that, as a result of the district court's July 1996 order denying respondents' motion to transfer, petitioners have not been affected in any way by the Sixth Circuit's April 1996 decision that the district court had jurisdiction to entertain respondents' motion to transfer the claims against the Shareholders to the Eastern District of Michigan for trial. Unless respondents prevail in their pending Sixth Circuit appeal from the district court's most recent order, the issues raised in the petitions will be moot. And if respondents do prevail in that appeal, the questions presented here may be raised in a subsequent petition from the upcoming Sixth Circuit decision.

In any event, there is no circuit conflict on the issue whether potential contribution or indemnity claims, arising out of the debtor's acts, establish "related to" jurisdiction under 28 U.S.C. § 1334(b). The circuits agree that there is jurisdiction under § 1334(b) as long as it is *possible* that a case *may* affect the bankruptcy. Nor are the circuits divided on whether a district court has the authority, in setting trial venue under 28 U.S.C. § 157(b)(5), to transfer cases related to the bankruptcy to the district where the bankruptcy is pending for trial. Indeed, in accordance with the plain language of the statute, the circuits have uniformly upheld the power to order such transfers in appropriate cases. See, *e.g.*, *Robins*, 788 F.2d at 1010.

I. RECENT DEVELOPMENTS IN THIS CASE MAKE REVIEW COMPLETELY UNNECESSARY.

The principal point in the petitions — that this Court's review is essential so that the claims against the Shareholders are not transferred to the Eastern District of Michigan for trial — is simply inexplicable. As noted above, the district court, on July 30, 1996, again refused to transfer the claims against the Shareholders, on grounds different from those articulated before. The Sixth Circuit is currently reviewing that decision. Under these circumstances, there obviously is no need to review the earlier Sixth Circuit decision that the district court had jurisdiction to entertain the transfer motion. If the Sixth Circuit affirms the most recent decision denying transfer (or dismisses the appeal for lack of jurisdiction, as petitioners have requested), then the Sixth Circuit's earlier decision on transfer will be of academic interest only. That decision would have no impact on this case; the bottom line would be that no transfers will occur regardless of whether this Court affirmed or reversed the Sixth Circuit decision that is the subject of the current petitions for certiorari.

Alternatively, if the current Sixth Circuit appeal results in reversal of the district court's refusal to transfer, petitioners may then seek review of *that* decision, at which time they could raise the very issues they are raising now. *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari). If that occurs, the Court, in deciding whether to review the transfer issue at that time, would have the benefit of the Sixth Circuit's most recent views on the best way for the judiciary to manage this massive litigation.

"[M]any orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters." *American Constr. Co. v. Jacksonville, T. & K. W. Ry.*, 148 U.S. 372, 384 (1893). This is just such

a case. This Court has long followed the general rule that it will not grant certiorari when the courts below have not yet reached a final decision on a particular issue and later events in the case may make the issues raised in the petition moot or insignificant. *Ibid.*; see also, *e.g.*, *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). The reasons for denying review are even stronger here. Because of intervening events in the district court, the petitioners are not harmed in any way by the decision that they challenge in the petitions. On the contrary, the current posture is that transfer has been denied, exactly the result that petitioners have requested. Under these circumstances, it would be imprudent for the Court to grant review at this juncture.

II. THE SIXTH CIRCUIT'S RULING ON "RELATED TO" JURISDICTION IS CORRECT AND DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

The petitions for certiorari rest largely on the premise that the Sixth Circuit's decision on "related to" jurisdiction conflicts with rulings in other circuits. Pet. 12-18; O'Quinn Pet. 8-11. In fact, however, the purported conflict is illusory with respect to the issues involved in this case; the Sixth Circuit's ruling is fully consistent with decisions of other courts of appeals. While the circuits may be "split on how best to interpret this statutory language" in other contexts, *In re Fedpak Systems, Inc.*, 80 F.3d 207, 213 (7th Cir. 1996), they are not divided in any way that is relevant to this case.

1. The Sixth Circuit held that the possibility that the debtor would be held liable to non-debtors for contribution or indemnity "suffices to establish a conceivable impact on the estate in bankruptcy." Pet. App. 20a. Other courts of appeals have reached the same conclusion. See *In re G.S.F.*

Corp., 938 F.2d 1467, 1476 (1st Cir. 1991) (a "potential indemnity claim" is related to the bankruptcy because it "puts the * * * estate at risk of liability for what could be a substantial damage award"); *Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 750 (7th Cir. 1989) ("Potential liability" of non-debtors, who could assert indemnity claim against the debtor, would be "'related' to the bankruptcy" if the non-debtors filed their "contingent claims" against the estate by the bar date); see also *In re Wood*, 825 F.2d 90, 94 (5th Cir. 1987) (finding "related to" jurisdiction over suit against non-debtor where, depending on the outcome of the litigation, the debtor "may bear" all, part, or none of the judgment).

It is true, of course, that in its 1984 decision in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), the Third Circuit stated that an action between non-debtors that could result in a contribution action against the debtor is related to the bankruptcy only if a judgment against the defendant would result in the "automatic creation of liability" against the debtor. *Id.* at 995. As the Sixth Circuit observed, however, the facts in this case are dramatically different; "there is a qualitative difference" between the "single possible claim for indemnification" at issue in *Pacor* and the "threat" to a reorganization plan that is "posed by the thousands of potential indemnification claims at issue here." Pet. App. 20a-21a.

More fundamentally, as the Sixth Circuit also noted (Pet. App. 15a), the Third Circuit no longer follows *Pacor*'s requirement of "automatic" liability. Instead, the Third Circuit now adheres to the consensus view that "a civil proceeding is related to bankruptcy" if "the outcome of that proceeding could *conceivably* have any effect on the estate." *Pacor*, 743 F.2d at 994 (emphasis omitted). In fact, the author of *Pacor* (Judge Garth) has joined in an opinion explaining that

> [a] key word in this test is "conceivable." *Certainty, or even likelihood, is not a requirement.* Bankruptcy jurisdiction will exist so long as it is *possible* that a proceeding *may* impact on "the debtor's rights, liabilities, options, or freedom of action" or the "handling and administration of the bankrupt estate."

In re Marcus Hook Development Park, Inc., 943 F.2d 261, 264 (3d Cir. 1991) (emphasis added) (citing, *inter alia*, the Sixth Circuit's decision in *In re Wolverine Radio Co.*, 930 F.2d 1132, 1143 (1991), *cert. dismissed*, 503 U.S. 978 (1992)).[4] The Third Circuit's most recent discussion of "related to" jurisdiction reaffirms the *Marcus Hook* standard. *In re Guild & Gallery Plus, Inc.*, 72 F.3d 1171, 1181 (3d Cir. 1996).

All of this is consistent with a long line of cases holding that actions involving non-debtors that *may* affect a bankruptcy are within federal jurisdiction under § 1334(b). This Court's decision in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995), is but one example. In *Celotex*, the Court held that "related to" jurisdiction was established where, if suits against the debtor's sureties proceeded, the sureties (a) "'would *seek* to lift the Section 105 stay to reach Debtor's collateral,'" (b) triggering actions by debtor to preserve its rights, (c) both of which "'*could* completely destroy any chance of resolving the prolonged insurance coverage disputes,'" and (d) settlement of the insurance disputes "'*may well be* the linchpin of Debtor's formulation of a feasible

---

[4] The *Wolverine Radio* court held that there was "related to" jurisdiction even though the debtor "would not be affected until and unless" the non-debtor sought indemnification. 930 F.2d at 1143. The court recognized that the non-debtors' dispute "may ultimately have no effect on the debtor." *Ibid.*

plan.'" *Id.* at 1500 (emphasis added). See also, *e.g.*, cases cited at Pet. App. 15a-17a, 22a-23a (all holding that "related to" jurisdiction exists when third-party actions *might* affect the bankruptcy estate); *Zerand-Bernal Group v. Cox*, 23 F.3d 159, 162 (7th Cir. 1994) (Posner, C.J.) (one purpose of § 1334(b) is to "force into the bankruptcy court suits to which the debtor need not be a party but which *may* affect the amount of property in the bankrupt estate") (emphasis added); *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 114 (2d Cir. 1992) ("The test for determining whether litigation has a significant connection with a pending bankruptcy proceeding is whether its outcome *might* have any '*conceivable* effect' on the bankrupt estate") (emphasis added).

In short, there is no circuit split on whether potential contribution or indemnity claims against the debtor, based on the debtor's alleged conduct, are sufficient to provide a basis for "related to" jurisdiction. To the contrary, in accordance with this Court's decision in *Celotex*, the courts of appeals recognize uniformly that such claims are related to the bankruptcy because they may affect the size of the estate, the length of time bankruptcy proceedings are pending, and the debtor's ability to finally resolve its liabilities in the reorganization process.

2. It is simply not true that the Sixth Circuit's decision is "a recipe for total paralysis" and that the cases against the Shareholders are "effectively frozen pending resolution of the * * * bankruptcy." Pet. 9, 11. Rather, in recognition of the significant impact that those claims — all based on allegedly defective Dow Corning products — could have on Dow Corning's reorganization efforts, Dow Corning is simply attempting to keep the claims against it and its Shareholders together in one federal court so that this massive litigation can be coordinated in a sensible and economical fashion. That is the only way to maximize the assets in Dow Corning's estate and optimize the chances for a successful

reorganization, while at the same time resolving Dow Corning's contingent breast implant liabilities comprehensively and equitably.

This would not, as the petitioners assert, bring the cases to a grinding halt. On the contrary, discovery and other pretrial activities can continue (and have continued) in a coordinated, coherent fashion. To be sure, keeping all of the cases against the debtor and its Shareholders together will prevent the threat of scores of simultaneous *trials*.[5] But this is likely to facilitate resolution of the cases, not impede it. A single judge in control of all of the cases could ensure an orderly scheduling of trials so that the burden of defending them — and the drain on the joint insurance — does not become overwhelming.

Even more importantly, that judge would also be in the best position to devise means of resolving, in a single proceeding, issues common to all of the cases, such as whether the debtor's implants cause disease. *E.g.*, *In re Bendectin Litig.*, 857 F.2d 290, 294, 308-317 (6th Cir. 1988) (ruling that the district court properly held a causation-only trial to determine whether Bendectin causes birth defects), *cert. denied*, 488 U.S. 1006 (1989); *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 473 (5th Cir. 1986) (approving the use of a consolidated trial to litigate whether the defendants' products were defective and the state of the art defense in thousands of asbestos cases). Indeed, the court of appeals stressed that its "primary goal" in this litigation is "to establish a mechanism for resolving the claims at issue in

---

[5] "[M]any" cases are not "verging on trial." Pet. 11. In connection with the district court's most recent denial of transfer — now on appeal in the Sixth Circuit — petitioners identified only 14 cases with actual trial dates in the near future, none of which involves the Shareholders.

the most fair and equitable manner possible." Pet. App. 7a. Along these lines, Judge Pointer in recent months has appointed a Rule 706 panel of independent experts to assist in the resolution of scientific issues in the MDL proceeding, and the bankruptcy judge is currently considering Dow Corning's motion for appointment of a Rule 706 panel to be used as part of the bankruptcy process. There might also be a common issues trial in the Eastern District of Michigan to resolve the question whether Dow Corning's implants cause disease — an issue that the debtor *and* the Shareholders face in all of the cases against them. Other alternatives are available as well.[6]

Efforts like these not only go a long way to avoiding the dissipation of the joint insurance proceeds that might otherwise result from massive, simultaneous, and uncoordinated litigation against the debtor's Shareholders, but they preserve the opportunity to resolve *all* of the claims involving the debtor's products expeditiously, on a global basis. If, on the

---

[6] For example, Judge Pointer has already granted final summary judgment in favor of Corning, *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 887 F. Supp. 1455 (N.D. Ala. 1995), and has narrowed (and pursuant to some pending motions, could further narrow) the remaining issues with respect to Dow Chemical. In addition, Judge Pointer currently has before him Dow Chemical's motion to certify for immediate appeal, under 28 U.S.C. § 1292(b), the court's ruling on Dow Chemical's motion for summary judgment. A ruling by the Eleventh Circuit in Dow Chemical's favor on the merits, in whole or in part, would, of course, resolve or, at a minimum, further streamline the litigation against Dow Chemical. As these examples illustrate, the possibility of a global resolution of the claims against the Shareholders — which otherwise threaten to drain the debtor's available insurance — and of avoiding the need for repetitive, duplicative briefing and/or trials in a series of courts is obviously enhanced if all of the cases are kept together in federal court.

other hand, the claims against the Shareholders are not transferred, thousands of cases against them will be tried separately, in virtually every jurisdiction in the country — an endeavor that will take years, cost enormous sums of money, and occupy vast blocks of judicial time. This would not only have a detrimental effect on the overwhelming majority of individual tort claimants, waiting for trials at the end of very long queues, but it could significantly delay the debtor's reorganization efforts (as well as deplete the size of the estate due to the erosion of the joint insurance).

3. The result here does not threaten the usurpation of "state judicial authority," as petitioners warn. Pet. 10. For one thing, thousands of the claims against the Shareholders will never be tried in state court even if this Court were to reverse the Sixth Circuit. There is federal jurisdiction over those claims for reasons unrelated to the bankruptcy; they are in federal court under diversity or federal question jurisdiction. C.A. App. 2032-2047, 2077-2083, 2105-2112. Well before Dow Corning's bankruptcy, these claims against the Shareholders were consolidated in front of Judge Pointer. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992).

As for the remaining claims, to the extent that § 1334(b) means that some state court suits are subject to the bankruptcy court's "related to" jurisdiction, that is a function of the "breadth," *Celotex*, 115 S. Ct. at 1499, of the language that Congress used in drafting the statute. Courts have held consistently since the statute was passed that state court litigation can be "related to" a bankruptcy proceeding within the meaning of § 1334(b). Thus, it has long been accepted that state court actions that may affect the size of the debtor's estate — in particular, suits that may affect the debtor's insurance (see Pet. App. 22a-23a) — are within the district court's "related to" jurisdiction.

In most cases, however, the practical effect of § 1334(b) on state court litigation is minimal; in a typical bankruptcy, many state cases are never transferred to federal court because the district court abstains. 28 U.S.C. § 1334(c)(1), (2). But "related to" jurisdiction, in conjunction with the venue-fixing power of 28 U.S.C. § 157(b)(5), also provides a means for the courts, in the interest of judicial efficiency, to attempt to resolve thousands of claims affecting the debtor's estate in one forum. Pet. App. 24a-26a; *Robins*, 788 F.2d at 1010-1014. Nothing in the statutory language requires that federal courts be deprived of that flexibility when needed in unusual circumstances.

4. Petitioners' contention that contribution or indemnity claims against the debtor are "farfetched" (Pet. 18) does not provide a basis for this Court's review either. As a factual matter, petitioners are wrong; the Shareholders have *already* asserted cross-claims for indemnity and contribution against Dow Corning. See p. 2, *supra*. Moreover, because the factual predicates for those claims and the context in which they will be litigated are not yet known, the Sixth Circuit correctly concluded that "the possibility of contribution or indemnification liability in this case is far from attenuated." Pet. App. 21a. This Court does not typically review factual determinations like that. Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, *Supreme Court Practice* 189 (7th ed. 1993).

III. THE SIXTH CIRCUIT'S RULING THAT THERE IS A POWER TO TRANSFER UNDER § 157(b)(5) IS CORRECT AND IS CONSISTENT WITH DECISIONS OF OTHER COURTS OF APPEALS.

The second question presented by petitioners concerns a district court's ability to transfer claims that affect a bankruptcy case: petitioners contend that district courts have *no* power to transfer *any* claims involving non-debtors under 28

U.S.C. § 157(b)(5). Pet. 19-23; O'Quinn Pet. 17-20. In other words, petitioners' theory is that even if it is indisputable that claims against third parties will have an effect on a bankruptcy case — say, by dissipating insurance proceeds that would otherwise be available to the estate — a district court would have no authority to transfer such cases to the district in which the bankruptcy was pending. Rather, a district court would have the power to transfer *only* claims asserted directly against the debtor.

1. No court has ever adopted such an extreme limitation on the power to transfer.[7] And the only other circuit to address the question whether personal injury claims "related to" a bankruptcy may be transferred under § 157(b)(5) when those claims are not against the debtor agrees with the Sixth Circuit. In *Robins*, the Fourth Circuit answered that question in the affirmative, reaching the same conclusion as that reached by the Sixth Circuit here. See 788 F.2d at 1010 (affirming an order transferring claims against non-debtors to the district in which the bankruptcy was pending; "[u]nquestionably" the district court "had the power under [§ 157(b)(5)] to fix the trial venue in its district for all the Dalkon Shield

---

[7] Petitioners cite *In re United States Lines*, 128 B.R. 339 (S.D.N.Y. 1991), for the proposition that § 157(b)(5) is only "a venue-setting provision for personal injury tort cases *against the debtor*" (Pet. 19-20), but that case says nothing of the sort. It holds only that claims pending in state court could not be transferred to federal court under § 157(b)(5) — a ruling that is no longer good law, having been rejected by the Second Circuit. See *In re Pan Am. Corp.*, 16 F.3d 513, 516 (2d Cir. 1994) ("the plain language" of § 157(b)(5) "authorize[s]" the transfer of cases from state court to federal court).

cases").[8] Thus, there is no disagreement among the courts of appeals on this question of statutory construction.

2. Petitioners' argument that § 157(b)(5) is limited to claims "against the debtor" (Pet. 19) is also contrary to the plain language of the statute. The phrases "against the debtor" and "against the estate" are nowhere to be found in § 157(b)(5); rather, the statute grants district courts the authority to set the venue for trials of "personal injury tort and wrongful death claims" generally. Nor is there anything to the argument that because Congress referred *elsewhere* in § 157 to personal injury claims "against the estate," it must have intended to apply this same limiting qualification to the district court's powers under § 157(b)(5). See Pet. 20 (quoting § 157(b)(2)(B)). Quite the contrary — Congress's decision to qualify personal injury claims in one section but not in another demonstrates clearly that "Congress, *when it desired to do so*, knew how to restrict the scope of" personal injury claims. *Patterson v. Shumate*, 504 U.S. 753, 758 (1992) (emphasis added). Congress's use of a "broader phrase" in § 157(b)(5) than in § 157(b)(2)(B) "strongly suggests that it did not intend to restrict the provision in the manner that petitioner[s] contend[ ]." *Ibid.*

3. The purpose of § 157(b)(5) is to centralize claims related to the bankruptcy in one forum in order to facilitate reorganization. Pet. App. 24a; *In re Pan Am. Corp.*, 950 F.2d 839, 845 (2d Cir. 1991). As the court of appeals

---

[8] Petitioners' contention that the *Robins* court did not order the transfer of claims against non-debtors (Pet. 21) is meritless. The Fourth Circuit unequivocally upheld the district court's authority to order the transfer to the Eastern District of Virginia of "*all actions related to* the Robins' Chapter 11 case now pending in any federal district court or subsequently removed," including claims against non-debtors. 788 F.2d at 998 (emphasis added).

recognized, the statute gives district courts the ability, in appropriate cases, to transfer all personal injury claims "related to" a bankruptcy because without this power, courts could not eliminate fragmented, duplicative, and wasteful litigation of "related to" claims, which would inevitably harm the reorganization process.[9] Pet. App. 24a-26a. Indeed, if the transfer of "related to" claims were not permitted, there would be little point in having courts decide whether a suit involving non-debtors was "related to" a bankruptcy case; that exercise only makes sense if a court can *do* something if the cases *are* related, like ordering a transfer.

* * *

The Sixth Circuit's refusal to deprive district courts of the flexibility to consolidate all related claims in the district in which the bankruptcy is pending is fully supported by precedent, logic, and the language of § 157(b)(5). There is no reason for this Court to grant review on the second question presented in the petitions.

---

[9] Centralization is particularly important with regard to the Shareholders because, wholly apart from the effect of separate litigation on the joint insurance, the claims against the debtor and the claims against the Shareholders are the *very same claims*: they are brought by the same plaintiffs, involve the same Dow Corning products, and have the same factual issues. There is no reason to require a plaintiff seeking compensation for one injury to litigate the same issues on two fronts — as part of the bankruptcy process *and* in state court.

CONCLUSION

The petitions for certiorari should be denied.

Respectfully submitted.

HERBERT L. ZAROV
JOHN E. MUENCH
JAMES C. SCHROEDER
THERESA A. CANADAY
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

Counsel for The Dow Chemical Company

BARBARA J. HOUSER
Counsel of Record
GEORGE H. TARPLEY
Sheinfeld, Maley & Kay P.C.
1700 Pacific Avenue, Suite 4400
Dallas, TX 75201-4618
(214) 953-0700

Counsel for Dow Corning Corporation

WILLIAM D. EGGERS
Nixon Hargrave Devans & Doyle LLP
P.O. Box 1051
Clinton Square
Rochester, NY 14603
(716) 263-1000

Counsel for Corning Incorporated

NOVEMBER 1996

Nos. 96-330 & 96-742

In the Supreme Court of the United States

OCTOBER TERM, 1996

Supreme Court, U.S.
FILED
NOV 27 1996
CLERK

OFFICIAL COMMITTEE OF TORT CLAIMANTS,
Petitioner,

v.

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, CORNING INCORPORATED, BAXTER INTERNATIONAL INCORPORATED, MINNESOTA MINING AND MANUFACTURING COMPANY, BRISTOL-MYERS SQUIBB COMPANY AND MEDICAL ENGINEERING CORPORATION,
Respondents.

BREAST IMPLANT TORT CLAIMANTS REPRESENTED BY O'QUINN, KERENSKY, MCANINCH & LAMINACK,
Petitioners,

v.

DOW CORNING CORPORATION, *et al.*,
Respondents.

RECEIVED
HAND DELIVERED
NOV 27 1996
OFFICE OF THE CLERK
SUPREME COURT, U.S.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS BAXTER INTERNATIONAL INC. AND BAXTER HEALTHCARE CORPORATION

THOMAS E. PITTS, JR.
SHELLEY C. CHAPMAN
SIDLEY & AUSTIN
875 Third Avenue
New York, NY 10022
(212) 906-2000

JUDY O'NEILL
LAURA J. EISELE
DYKEMA GOSSETT PLLC
400 Renaissance Center
Detroit, MI 48243
(313) 568-6800

CARTER G. PHILLIPS *
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

LARRY J. NYHAN
JAMES F. CONLAN
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7000

Counsel for Respondents Baxter International Inc. and Baxter Healthcare Corporation

November 27, 1996

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

35 pp

QUESTIONS PRESENTED

1. Whether the court below erred in finding "related to" subject matter jurisdiction pursuant to 28 U.S.C. § 1334(b) over tort claims pending against Baxter that were asserted jointly and severally against Baxter and a Chapter 11 Debtor, Dow Corning Corporation, in pre-bankruptcy tort actions.

2. Whether the court below erred in concluding that 28 U.S.C. § 157(b)(5) authorizes a district court in which a Chapter 11 bankruptcy case is pending to transfer civil actions "related to" the bankruptcy case, when such actions allege a single cause of action against both Baxter and Dow Corning Corporation.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed by petitioners, Baxter Healthcare Corporation was a party to the proceedings below.

STATEMENT REQUIRED BY RULE 29.6

Respondent Baxter Healthcare Corporation is a wholly-owned subsidiary of respondent Baxter International Inc., which is a publicly-owned corporation. Baxter Healthcare Corporation has no non-wholly owned subsidiaries. The non-wholly owned subsidiaries of Baxter International Inc. are Baxter S.A. (Belgium); Baxter S.A. (France); Baxter Healthcare (Holdings) Ltd. (U.K.); Baxter Healthcare Limited (U.K.); Baxter World Trade S.A. (Belgium); Baxter Healthcare Pty. Ltd. (Australia); Baxter A.G. (Switzerland); and Baxter S.A. de C.V. (Mexico).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING BELOW	ii
STATEMENT REQUIRED BY RULE 29.6	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITIONS	6
I. CERTIORARI SHOULD BE DENIED BECAUSE THIS CASE PRESENTS NO ISSUE THAT IS RIPE FOR THIS COURT'S CONSIDERATION	6
II. CERTIORARI SHOULD BE DENIED BECAUSE THE COURT BELOW CORRECTLY APPLIED SETTLED LAW IN A DECISION THAT DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR OF ANY OTHER COURT OF APPEALS	7
III. CONTRARY TO PETITIONERS' ASSERTION, THE SIXTH CIRCUIT WAS ENTIRELY CORRECT IN ITS READING OF 28 U.S.C. § 157 (b) (5)	15
IV. THE PETITIONS PRESENT NO ISSUE OF "DOCTRINAL SIGNIFICANCE" THAT WARRANTS REVIEW BY THIS COURT	17
CONCLUSION	19
APPENDIX	1a

TABLE OF AUTHORITIES

CASES — Page

8300 Newburgh Road Partnership v. Time Construction, Inc. (In re Time Construction, Inc.), 43 F.3d 1041 (6th Cir. 1995) 11
A.H. Robins Co., Inc. v. Piccinin (In re A.H. Robins Co., Inc.), 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986) 16
American Construction Co. v. Jacksonville, T. & K. W. R. Co., 148 U.S. 372 (1893) 6
American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.), 885 F.2d 621 (9th Cir. 1989) 10
Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A. R.R. Co., 389 U.S. 327 (1967) 6
Calumet National Bank v. Levine (In re Levine), 179 B.R. 117 (N.D. Ind. 1995) 16
In re Celotex Corp., 140 B.R. 912 (Bankr. M.D. Fla. 1992) 9
Celotex Corp. v. Edwards, 115 S. Ct. 1493 (1995) ..... *passim*
Coker v. Pan American World Airways, Inc. (In re Pan American Corp.), 950 F.2d 839 (2d Cir. 1991) 16
In re Fedpack Systems, Inc., 80 F.3d 207 (7th Cir. 1996) 14
Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 6, 7
Indianapolis v. Chase National Bank, 314 U.S. 63 (1941) 7
Kelley v. Nodine (In re Salem Mortgage Co.), 783 F.2d 626 (6th Cir. 1986) 10
MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.), 837 F.2d 89 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988) 10
In re Marcus Hook Development Park, Inc., 943 F.2d 261 (3d Cir. 1991) 11, 12, 13
Mercer v. Theriot, 377 U.S. 152 (1964) 7
Michigan Employment Security Commission v. Wolverine Radio Co. (In re Wolverine Radio Co.), 930 F.2d 1132 (6th Cir. 1991), *cert. dismissed*, 503 U.S. 978 (1992) 11

TABLE OF AUTHORITIES—Continued

	Page
Miller v. Kemira (In re Lemco Gypsum, Inc.), 910 F.2d 784 (11th Cir. 1990)	13, 18
Murray v. Pan American World Airways, Inc. (In re Pan Am Corp.), 16 F.3d 513 (2d Cir. 1994)	16
Oberg v. Aetna Casualty & Surety Co. (In re A.H. Robins Co.), 828 F.2d 1023 (4th Cir. 1987), *cert. denied*, 485 U.S. 969 (1988)	10
Pacor, Inc. v. Higgins, 743 F.2d 984 (1984)	11
Robinson v. Michigan Consolidated Gas Co., 918 F.2d 579 (6th Cir. 1990)	11
Sanders Confectionery Products, Inc. v. Heller Financial, Inc., 973 F.2d 474 (6th Cir. 1992), *cert. denied*, 506 U.S. 1079 (1993)	11
Scott v. United States, 436 U.S. 128 (1978)	7
The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959)	6
Torkelsen v. Maggio (In re Guild and Gallery Plus, Inc.), 72 F.3d 1171 (3d Cir. 1996)	13
In re Turner, 724 F.2d 338 (2d Cir. 1983)	13
Wood v. Wood (In re Wood), 825 F.2d 90 (5th Cir. 1987)	18

STATUTES

11 U.S.C. § 501(b)	5, 15
28 U.S.C. § 157(b)(5)	4, 15, 16, 17
28 U.S.C. § 1334(b)	*passim*
28 U.S.C. § 1334(c)	2, 5, 17
Fed. R. Bankr. P. 3005	15

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-330

OFFICIAL COMMITTEE OF TORT CLAIMANTS,
Petitioner,

v.

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, CORNING INCORPORATED, BAXTER INTERNATIONAL INCORPORATED, MINNESOTA MINING AND MANUFACTURING COMPANY, BRISTOL-MYERS SQUIBB COMPANY AND MEDICAL ENGINEERING CORPORATION,
Respondents.

No. 96-742

BREAST IMPLANT TORT CLAIMANTS REPRESENTED BY O'QUINN, KERENSKY, MCANINCH & LAMINACK,
Petitioners,

v.

DOW CORNING CORPORATION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENTS BAXTER INTERNATIONAL INC. AND BAXTER HEALTHCARE CORPORATION

Baxter International Inc. and Baxter Healthcare Corporation (collectively, "Baxter") hereby oppose the petitions for a writ of certiorari filed by the Official Committee of Tort Claimants (the "Committee Petition") and by the breast implant tort claimants represented by O'Quinn, Kerensky, McAninch & Laminack (the "O'Quinn Petition", and, together, the "Petitions"). The merits of this case involve the application of the provisions of a discrete jurisdictional statute to the facts of a mass tort litigation in which Baxter, among others, and a Chapter 11 debtor, Dow Corning Corporation, are defendants. Given the procedural posture of the case, the questions presented are not ripe for this Court's consideration, and the Petitions should be denied on that basis alone. Even if the merits were ripe for consideration, however, the questions presented are not worthy of this Court's attention. The decision below is not at odds with any decision of any court of appeals, and is entirely consistent with this Court's recent decision in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995). Accordingly, the Petitions should be denied.

OPINIONS BELOW

In addition to the opinions cited by petitioners, the opinions below include the opinion issued on July 30, 1996 by the district court, in which that court, pursuant to 28 U.S.C. § 1334(c), declined to exercise jurisdiction over the claims against Baxter and the other nondebtor co-defendents, which the Sixth Circuit had held to be "related to" the Debtor's bankruptcy. This opinion is reprinted at Resp. App. 1a-8a.

STATEMENT OF THE CASE

Petitioners load their statements of the case with "facts" that are both highly disputed and immaterial to the issues presented by the decision below. Baxter will not burden the Court with a point-by-point response, but will instead confine its statement to material facts relevant to the questions presented for the Court's consideration.

1. Breast implants containing silicone have been on the market for more than 30 years. Originally designed by plastic surgeons in cooperation with Dow Corning Corporation ("Dow Corning" or the "Debtor"), these devices were believed to be superior in their cosmetic and reconstructive uses to implants made of other substances. By most accounts, the Debtor manufactured at least one-half of the silicone gel-filled implants sold during that period. The balance were manufactured by other companies including 3M (or its affiliates), Bristol-Myers (or its affiliates), and Heyer-Schulte, the manufacturer whose products are the cause of Baxter's involvement in this dispute (collectively, the "Co-defendants").[1] The Debtor was also the source of much of the silicone gel used in implants manufactured by other companies, including more than 90 percent of the implants sold by Heyer-Schulte. Moreover, every single implant manufactured by Heyer-Schulte had at least one silicone component manufactured by the Debtor.

Because the Debtor itself manufactured massive numbers of implants and was a principal supplier of the silicone used by these other implant makers, the Debtor and its affiliates were routinely named as co-defendants in lawsuits involving implants manufactured by others. By the date of the Debtor's Chapter 11 petition, tens of thousands of suits involving silicone breast implants had been brought in the United States. The actions in which both the Debtor and Baxter are defendants number more than 5,000, involving more than 14,000 plaintiffs. In most of these actions, the Debtor and Baxter are alleged to be

---

[1] Baxter has never designed, manufactured, or marketed breast implants. Baxter is a defendant in these cases only because Baxter is, as a consequence of a series of corporate acquisitions and mergers, responsible for certain liabilities of Heyer-Schulte, the entity that manufactured the implants. Accordingly, the name "Heyer-Schulte" is used where appropriate in this opposition.

joint tortfeasors and jointly and severally liable for the damages asserted.

Indeed, every plaintiff who has sued both the Debtor and Baxter on account of silicone breast implants alleges that she suffers from one or more diseases caused by silicone, and that silicone was introduced into her body by both companies in one of two ways—either the plaintiff underwent multiple implants with devices manufactured and sold by both the Debtor and Heyer-Schulte, or the plaintiff received Heyer-Schulte implants containing silicone gel (or other components) manufactured by the Debtor. Thus, each plaintiff alleges a single set of symptoms, a single chemical agent of disease, and a single cause of action involving two defendants—two defendants whose responsibility for those symptoms and that disease is, from each plaintiff's perspective, unitary. This describes the thousands of cases in which Baxter and the Debtor are co-defendants that were the subject of the motion filed by Baxter in the district court pursuant to 28 U.S.C. § 157(b)(5); similar motions were filed by 3M and Bristol Meyers (collectively, the "Co-defendant Motions").

2. The Co-defendant Motions asked the district court to exercise its jurisdiction under 28 U.S.C. § 1334(b) and to exercise its power under 28 U.S.C. § 157(b)(5) to order that the personal injury tort and wrongful death claims "be tried in the district court in which the bankruptcy case is pending, or in the district court in which the claim arose, as determined by the district court in which the bankruptcy case is pending." 28 U.S.C. § 157(b)(5). On September 12, 1995, the district court denied transfer of the claims covered by the Co-defendant Motions on the ground that it lacked subject matter jurisdiction over the tort actions. Committee Pet. App. at 57a-64a.

On appeal, the court of appeals was required to decide whether the billions of dollars in lawsuits against Baxter and the other Co-defendants, with the attendant billions of dollars in contribution claims against the Debtor by the Co-defendants, could conceivably have an effect on

the administration of the Debtor's estate. The Sixth Circuit decided that, under well-established and non-controversial legal principles, the lawsuits could have such an effect and, accordingly, held that "related to" jurisdiction under 28 U.S.C. § 1334(b) exists with respect to these personal injury claims. Committee Pet. App. at 1a-28a.

The Sixth Circuit further concluded that 28 U.S.C. § 157(b)(5) permits the district court to fix the trial venue of all breast implant cases pending against Baxter and the other Co-defendants that are "related to" the Debtor's bankruptcy proceeding. Committee Pet. App. at 23a-26a. The court of appeals then remanded the case to the district court to determine "whether the abstention exception in Section 157(b)(4) applies to claims pending against nondebtor defendants and, if not, whether the factors calling for mandatory exemption [sic] under Section 1334(c)(2) have been met." Committee Pet. App. at 28a. The district court was also directed to address the issue of discretionary abstention under 28 U.S.C. § 1334(c)(1). *Id.*

3. On July 30, 1996, the district court on remand ruled that all of the personal injury actions against all of the Co-defendants were subject to mandatory abstention under 28 U.S.C. § 1334(c)(2) and, in the alternative, exercised its discretion to abstain from hearing those actions pursuant to 28 U.S.C. § 1334(c)(1). Resp. App. at 1a-8a. Baxter and the other Co-defendants have appealed the abstention order to the Sixth Circuit, which has expedited review, notwithstanding petitioners' attempt to have such appeals dismissed. Thus, as this opposition brief is being submitted to this Court, this case is awaiting a second Sixth Circuit decision. Although a successful appeal by the Debtor or the Co-defendants could potentially make this issue ripe—although certainly not worthy of certiorari—the procedural posture of the action below makes review of these petitions premature. The district court is not currently exercising jurisdiction over any of the claims that are covered by the Co-defendant Motions,

and not a single case against the Co-defendants has been transferred to the district court.

REASONS FOR DENYING THE PETITIONS

I. CERTIORARI SHOULD BE DENIED BECAUSE THIS CASE PRESENTS NO ISSUE THAT IS RIPE FOR THIS COURT'S CONSIDERATION.

As this Court noted long ago, "[w]hile this Court decides questions of public importance, it decides them in the context of meaningful litigation." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). That context is wholly absent here. *See also Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A. R.R. Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *American Construction Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893).

Indeed, petitioner Tort Committee recognizes this problem, acknowledging that, at least for now, the district court's decision to abstain stands. Undaunted, however, petitioner Tort Committee argues that "the general significance of what the Sixth Circuit has held remains unimpaired" and that the "sweeping dimensions of 'related to' jurisdiction as defined by the Sixth Circuit may be counted on to serve the visible purpose of both blocking state litigation and transferring it from the court in which plaintiffs have exercised their right to proceed." Committee Pet. at 11-12.

Petitioners' invitation to the Court to issue a sweeping advisory opinion should be declined. If the Sixth Circuit were to reverse the July 30 district court order and if, upon remand, the district court were to exercise jurisdiction over the claims against Baxter and the other Co-defendants, petitioners would be free to present their argu-

ments anew in a second petition for certiorari. It is well established that this Court may reach back and decide "all of the substantial federal questions determined in the earlier stages of the litigation." *Mercer v. Theriot*, 377 U.S. 152, 153 (1964) (quoting *Reece v. Georgia*, 350 U.S. 85, 87 (1955)); *see also Scott v. United States*, 436 U.S. 128 (1978) (same); *Indianapolis v. Chase National Bank*, 314 U.S. 63 (1941) (same); *Hamilton-Brown Shoe Co.*, 240 U.S. at 257 (same). Granting the Petitions at this stage of the litigation would be a waste of this Court's limited resources.[2]

II. CERTIORARI SHOULD BE DENIED BECAUSE THE COURT BELOW CORRECTLY APPLIED SETTLED LAW IN A DECISION THAT DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR OF ANY OTHER COURT OF APPEALS.

Petitioner Tort Committee asserts that the opinion issued by the Sixth Circuit "represents an unprecedented expansion of bankruptcy jurisdiction." Committee Pet. at 4. It does not. As a review of the substantial precedent interpreting 28 U.S.C. § 1334(b) makes quite clear, virtually all of the courts of appeals, and this Court, have articulated the same standard for determining whether a bankruptcy court or district court has jurisdiction over a case that is "related to" a case under Chapter 11. The Sixth Circuit's opinion is neither unprecedented nor is it any jurisdictional expansion at all; in fact, the approach of the Sixth Circuit to determining whether a proceeding is "related to" a Chapter 11 case is thoroughly conservative.

---

[2] The argument made in the O'Quinn Petition, that mootness should not preclude review at this juncture because the issue at bar is "capable of repetition yet evading review," O'Quinn Pet. at 2. n.2, is sorely misplaced. This Court's opinion in *Celotex* makes clear that this issue is not capable of evading review.

Only last term, in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995), this Court construed Section 1334(b) subject matter jurisdiction broadly, citing with approval the numerous decisions of courts of appeals that have held that a case is "related to" a Chapter 11 case if its outcome could "conceivably have any effect on the estate being administered in bankruptcy." *Id.* at 1499 n.6 (citing *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). Indeed, this Court noted that in crafting Section 1334, Congress broke with narrower, past jurisdictional grants to bestow broad and comprehensive, though certainly not limitless, jurisdiction on bankruptcy courts. *Celotex*, 115 S. Ct. at 1499.

A careful reading of *Celotex* is itself sufficient to defeat petitioners' argument. In *Celotex*, this Court explicitly adopted the Third Circuit's conclusion in *Pacor* that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate," along with its rather obvious caution that " 'related to' jurisdiction cannot be limitless." *Celotex*, 115 S. Ct. at 1499 (citing *Pacor*, 743 F.2d at 994). While the Court did not explicitly endorse the "conceivable effect" test (or any other test for that matter) for "related to" jurisdiction adopted by virtually every circuit, it *did* cite with approval the leading bankruptcy treatise that was the source of the "any effect" or "conceivably have any effect" standard. *Celotex*, 115 S. Ct at 1498-99 n.5 (citing 1 *Collier on Bankruptcy* ¶ 3.01[1][c][iv] at 3-28 to 3-29 (15th ed. 1995)). And this Court did point out that the "conceivable effect" test is the law in nine of the eleven circuits that have spoken on the issue. *Id.* at 1499 n.6.[3]

---

[3] As will be discussed below, this Court did not find that the circuits were split on this issue. Rather, it noted that two of the circuits (the Sixth not among them) have adopted a "slightly different test." 115 S. Ct. at 1499 n.6. Under any formulation of the test, the claims in these cases are unquestionably "related."

Moreover, the Court did not endorse the Third Circuit's somewhat restrictive application of the "conceivable effect" test in *Pacor*. In essence, the Court held that under any relevant test, the injunction in *Celotex* fell within the "related to" jurisdiction of the bankruptcy court. The same is true of the ruling here.

There is much in *Celotex* that supports the approach employed by the Sixth Circuit. In deciding not to dissolve the injunction against certain non-debtor third parties, the bankruptcy court in *Celotex* made the following findings:

> [I]f the Section 105 stay were lifted to enable the judgment creditors to reach the sureties, the sureties in turn would seek to lift the Section 105 stay to reach Debtor's collateral, with corresponding actions by Debtor to preserve its rights under the settlement agreements. Such a scenario could completely destroy any chance of resolving the prolonged insurance coverage disputes currently being adjudicated in this Court. The settlement of the insurance coverage disputes with all of Debtor's insurers may well be the linchpin of Debtor's formulation of a feasible plan. Absent the confirmation of a feasible plan, Debtor may be liquidated or cease to exist after a carrion feast by the victors in a race to the courthouse.

In re Celotex Corp., 140 B.R. 912, 915 (Bankr. M.D. Fla. 1992), *quoted in Celotex*, 115 S. Ct. at 1500. This Court's repetition of such a chain of "conceivable effects" as supporting its jurisdictional conclusion in *Celotex* is striking. And its reason for this reference was to drive home a fundamental, long-standing point about bankruptcy jurisdiction:

> In light of these findings by the Bankruptcy Court, it is relevant to note that we are dealing here with a reorganization under Chapter 11, rather than a liquidation under Chapter 7. The jurisdiction of bank-

> ruptcy courts may extend more broadly in the former case than in the latter. Cf. *Continental Illinois Nat. Bank & Trust Co. v. Chicago, R.I. & P.R. Co.*, 294 U.S. 648, 676, 79 L. Ed. 1110, 55 S. Ct. 595, 606 (1935).

Celotex, 115 S. Ct. at 1500.

The Court noted that its holding "is in accord with representative recent decisions of the Courts of Appeals." *Celotex*, 115 S. Ct. at 1500. It then listed three decisions that epitomize the practical approach to jurisdiction that the Sixth Circuit has followed for over a decade. *American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.)*, 885 F.2d 621, 624 (9th Cir. 1989); *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988); *Oberg v. Aetna Casualty & Surety Co. (In re A.H. Robins Co.)*, 828 F.2d 1023 (4th Cir. 1987), *cert. denied*, 485 U.S. 969 (1988). Each of these cases involved the exercise of bankruptcy jurisdiction over claims between non-debtors, and each of these cases was resolved by determining whether *substantive* provisions of the Bankruptcy Code authorized or prohibited the relief sought. "Related to" jurisdiction, if discussed at all, was upheld summarily.

The decision below follows longstanding Sixth Circuit precedent. For over a decade, the Sixth Circuit has consistently held that where the facts of a case suggest that the potential for contribution claims against the debtor is real and there is therefore a genuine likelihood that tort actions could have an impact on the debtor's estate, the underlying tort actions that originally named the debtor as a co-defendant are "related to" the bankruptcy case. Moreover, the Sixth Circuit, for years, has consistently applied the holding that automatic debtor liability is not a prerequisite to "related to" jurisdiction. *See Kelley v. Nodine (In re Salem Mortgage Co.)*, 783 F.2d 626 (6th Cir. 1986) (upholding "related to" jurisdiction despite

absence of automatic debtor liability); *Robinson v. Michigan Consolidated Gas Co.*, 918 F.2d 579 (6th Cir. 1990) (same); *Michigan Employment Security Commission v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132 (6th Cir. 1991), *cert. dismissed*, 503 U.S. 978 (1992) (same); *Sanders Confectionery Products, Inc. v. Heller Financial, Inc.*, 973 F.2d 474 (6th Cir. 1992), *cert. denied*, 506 U.S. 1079 (1993) (same); *8300 Newburgh Road Partnership v. Time Construction, Inc. (In re Time Construction, Inc.)*, 43 F.3d 1041 (6th Cir. 1995) (per curiam) (similar conclusion in dicta).

Furthermore, there simply is no circuit split on this issue. To attempt to create a split with the Sixth Circuit, petitioners allege a "direct conflict" (Committee Pet. at 9, O'Quinn Pet. at 8-10) with the Third Circuit's holding in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (1984). This Court found no such split last year, when it noted in *Celotex* that eight circuits had adopted the *Pacor* "any conceivable effect" test with "little or no variation," and that two circuits "seem to have adopted a slightly different test." *Celotex*, 115 S. Ct. at 1499 n.6. Even more importantly, this Court cited the Sixth Circuit's decision in *Salem Mortgage—which applied the exact same rule of law as did the opinion below*—as one of the many circuit opinions that had followed the approved portion of *Pacor* with little or no variation.

Indeed, it is evident from opinions rendered after *Pacor*, that the Third Circuit perceives no conflict with its sister circuits and has retreated from the very narrow facet of *Pacor* upon which the Tort Committee places total reliance, *i.e.*, that a claim against a third party must "automatically" create liability against the debtor to fall within the court's "related to" jurisdiction.[4] Thus, in *In re Marcus Hook*

---

[4] It is also important to note that the Sixth Circuit below, applying the approach that has pervaded its analysis and the analysis of

Development Park, Inc., 943 F.2d 261 (3d Cir. 1991), the Third Circuit held that "related to" jurisdiction existed over an action between two third parties relating to property that had once been part of the debtor's estate, even though there was no certainty that resolution of the dispute would have any impact on the debtor's estate. Construing the very statutory subsection at issue here, the Third Circuit repeatedly quoted from and relied upon decisions from the Fifth and Sixth Circuits, including *Salem*:

> A proceeding is related to bankruptcy if *"the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy," Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) (emphasis in original). *Accord In re Fietz*, 825 F.2d 455, 457 (9th Cir. 1988); *Matter of Wood*, 825 F.2d at 93 [5th Cir. 1987]; *In re Dogpatch U.S.A., Inc.*, 810 F.2d 782, 786 (8th Cir. 1987); *In re A.H. Robins Co., Inc.*, 788 F.2d 994, 1002 n.11 (4th Cir.), *cert. denied*, 479 U.S. 876, 107 S. Ct. 251, 93 L. Ed.2d 177 (1986); *In re Salem Mortgage Co.*, 783 F.2d 626, 634 (6th Cir. 1986). A key word in this test is "conceivable." Certainty, or even likelihood, is not a requirement. *In re Wolverine Radio Co.*, 930 F.2d at 1143 [6th Cir. 1991]. Bankruptcy jurisdiction will exist so long as

---

other circuit courts for over a decade, indicated that the facts before it distinguished this case from *Pacor*. The Sixth Circuit held that:

> [T]here is a qualitative difference between the single suit involved in Pacor and the overwhelming number of cases asserted against Dow Corning and the nondebtor defendants in this case. A single possible claim for indemnification or contribution simply does not represent the same kind of threat to a debtor's reorganization plan as that posed by the thousands of potential indemnification claims at issue here. Cognizant of the fact that "related to" jurisdiction cannot be limitless and concerned about granting benefits of the automatic stay in bankruptcy to solvent co-defendants, we nevertheless believe the possibility of contribution or indemnification liability in this case is far from attenuated.

Committee Pet. App. at 20-21a.

> it is possible that a proceeding may impact on "the debtor's rights, liabilities, options, or freedom of action" or the "handling and administration of the bankrupt estate." *In re Smith*, 866 F.2d 576, 580 (3d Cir. 1989). *Accord Pacor, Inc. v. Higgins*, 743 F.2d at 994.

943 F.2d at 264 (emphasis in original, bracketed notations supplied). Accordingly, even if the Third Circuit may have started out in a slightly different position as to how the "related to" standard applies, subsequent rulings of that court make clear that it views its position as in accord with the other circuits.[6] *See also Torkelsen v. Maggio (In re Guild and Gallery Plus, Inc.)*, 72 F.3d 1171, 1181 (3d Cir. 1996) (applying *Marcus Hook* holding). There

---

[6] The argument of the O'Quinn Petitioners, that the opinion below splits with the Second and Eleventh Circuits, borders on frivolous. The Eleventh Circuit correctly noted that the decision in *Salem Mortgage*—in a specific holding that was directly quoted and reaffirmed in the opinion below—was among the more *conservative* opinions on the issue of "related to" jurisdiction, because it required that the connection to the estate not be overly remote. *See Miller v. Kemira (In re Lemco Gypsum, Inc.)*, 910 F.2d 784, 788 (11th Cir. 1990) (citing *Salem* approvingly and noting Sixth Circuit's conservative requirement that possibility of effect on estate not be remote). In the opinion below, the Sixth Circuit, citing *Salem*, again reaffirmed that " 'situations may arise where an extremely tenuous connection to the estate would not satisfy the jurisdictional requirement' of Section 1334(b)." Committee Pet. App. at 10a (*citing Robinson v. Michigan Consolidated Gas Co., Inc.*, 918 F.2d 579, 584 (6th Cir. 1990), *citing Salem Mortgage*, 783 F.2d at 634). Like this Court, the Sixth Circuit has repeatedly made clear that "related to" jurisdiction is not limitless.

The contention of a split with the Second Circuit is equally misguided. The O'Quinn Petition alleges a split with the Second Circuit based on one line in *In re Turner*, 724 F.2d 338 (2d Cir. 1983), in which that court noted that a "significant connection" to the estate was lacking in the case before it. In addition to the fact that this Court cited the *Turner* opinion in *Celotex* and found no split, there is simply no divergence between the *Turner* holding and that of the Sixth Circuit.

is simply no existing circuit conflict warranting this Court's review.[6]

Petitioners present no basis for disturbing the Sixth Circuit's application of well-settled precedent to the facts of this mass tort bankruptcy. The claims of the tort plaintiffs against Baxter are at least as closely "related to" the Debtor's bankruptcy as the claims of numerous entities as to whom jurisdiction was upheld in cases cited without objection by this Court in *Celotex*.

Baxter is a co-defendant with the Debtor in single causes of action that, in the aggregate, were the cause of the Debtor's resort to Chapter 11. It is a co-defendant, either because a plaintiff received multiple implants manufactured by *both* Heyer-Schulte and the Debtor, or because—if a Heyer-Schulte implant alone was at issue—every single implant ever made by Heyer-Schulte contained a silicone component manufactured by the Debtor. As a Co-defendant, Baxter has contingent, unliquidated claims for contribution and indemnity the size of which will be determined *exclusively* by the success of the plaintiffs' claims against Baxter. Moreover, as a party potentially co-liable with the Debtor, Baxter has the right to file, and intends timely to file, claims in the bankruptcy case for every claimant who asserts claims against Baxter for which

---

[6] Respondents recognize that the Seventh Circuit, citing no judicial precedent but its own, has applied a slightly more restrictive inquiry. *See In re Fedpack Systems, Inc.*, 80 F.3d 207 (7th Cir. 1996). Seemingly defensive about its decision not to follow the otherwise universal "conceivable effect" standard, that circuit court noted that "[w]hile the United States Supreme Court appears to favor a broad interpretation, it has not mandated such an approach." *Id.* at 213. The Seventh Circuit's somewhat more conservative variation of the *Pacor* test scarcely constitutes a split with its sisters. In any event, that the Seventh Circuit might apply a "slightly different test" *Celotex, supra*, 115 S. Ct. at 1499 n.16, is surely no reason to grant certiorari on a centrist opinion issued by the Sixth Circuit and on facts that would readily satisfy the Seventh Circuit standard.

the Debtor may be co-liable. 11 U.S.C. § 501(b); Fed. R. Bankr. P. 3005. Indeed, Baxter has already filed over 13,000 such claims in the Debtor's bankruptcy proceedings.

Although acknowledging that billions of dollars are at stake, petitioners nevertheless maintain that it is a "flight of advocates' fancy" (Committee Pet. at 18) to assume that any of the Co-defendants would seek indemnity or contribution from the company that was both the dominant manufacturer of breast implants and the principal supplier of raw materials used by other manufacturers in the production of breast implants. If a flight of fancy is anywhere to be found, it is in this contention. Baxter fully intends timely to file all proofs of claim necessary to preserve its legal rights against the Debtor.

Indeed, the repeated assertions in the Petitions that the Co-defendants have not yet filed contribution and indemnity claims—from which the petitioners ask this Court to draw various conclusions—are of no moment. The deadline for filing such claims is January 15, 1997. As Baxter has told every court and every attorney in this case from its inception, Baxter *will* file the claims necessary to preserve its rights by that date. Furthermore, it is ironic that the same plaintiffs who filed complaints asserting joint and several liability against Baxter and the Debtor now assert that there is no conceivable connection between their cases against Baxter and their cases against the Debtor—cases severed only because of the Debtor's intervening bankruptcy filing.

III. CONTRARY TO PETITIONERS' ASSERTION, THE SIXTH CIRCUIT WAS ENTIRELY CORRECT IN ITS READING OF 28 U.S.C. § 157(b)(5).

Petitioners also argue that the court below erred in holding that 28 U.S.C. § 157(b)(5) allows a district court to fix the trial venue of breast implant cases pending against Baxter and other Co-defendants that are "related to" the Debtor's bankruptcy proceedings pursuant to Section 1334(b). The Sixth Circuit's holding, argue

petitioners, is not only a "misreading" of the statute but also a threat to "the balance struck by Congress in setting forth the powers of courts sitting in bankruptcy." Committee Pet. at 19; O'Quinn Pet. at 17. On the contrary, the holding of the Sixth Circuit is based squarely on the only logical reading of the text of the statute, is consistent with the few cases that have interpreted it, and unquestionably promotes the statute's "oft-stated goal of centralizing the administration of a bankruptcy estate." Committee Pet. App. at 26a.

Petitioners' argument is based on words not found in the statute rather than on the language of the statute itself. First, petitioners note that the word "transfer" does not appear in the text of § 157(b)(5), and from this conclude that "transfer" is not available to Baxter even if "related to" subject matter jurisdiction exists. Petitioners ignore the fact that courts have consistently found "transfer" to be the proper relief under the statute. *Murray v. Pan American World Airways, Inc. (In re Pan Am Corp.)*, 16 F.3d 513 (2d Cir. 1994); *Coker v. Pan American World Airways, Inc. (In re Pan American Corp.)*, 950 F.2d 839 (2d Cir. 1991); *A.H. Robins Co., Inc. v. Piccinin (In re A.H. Robins Co., Inc.)*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986); *Calumet National Bank v. Levine (In re Levine)*, 179 B.R. 117 (N.D. Ind. 1995).[7]

These courts have recognized that Congress' purpose in enacting § 157(b)(5) was "to centralize the administration of the estate and to eliminate the 'multiplicity of forums for the adjudication of parts of a bankruptcy case.'" *A.H. Robins*, 788 F.2d at 1011 (citation

---

[7] Petitioners also argue that transfer pursuant to § 157(b)(5) is available only for tort claims "against the debtor", and that the Sixth Circuit erred in relying on *Robins* as authority for the transfer of non-debtor cases. Petitioners' arguments are unavailing. The words "against the debtor" similarly do not appear in the statute, and the transfer authorized in the *Robins* case (whether ultimately effected or not) covered entire actions, including claims against non-debtors as well as claims against the debtor.

omitted). Transfer is the only efficient means by which to accomplish these goals.

Recognizing the enormous implications to any Dow Corning reorganization posed by the thousands of potential contribution and indemnity claims held by the Co-defendants, the Sixth Circuit fully embraced the Fourth Circuit's reasoning in *A.H. Robins* that, especially in the context of a mass tort case, the centralization of all personal injury claims "increases the debtor's odds of developing a reasonable plan of reorganization which will 'work a rehabilitation of the debtor and at the same time assure fair and non-preferential resolution of the . . . claims.'" Committee Pet. App. at 24a, *citing A.H. Robins*, 788 F.2d at 1011. Petitioners offer no reason, compelling or otherwise, to disturb the Sixth Circuit's correct application of § 157(b)(5) to the facts of this case.

IV. THE PETITIONS PRESENT NO ISSUE OF "DOCTRINAL SIGNIFICANCE" THAT WARRANTS REVIEW BY THIS COURT.

The issue of national importance purportedly raised by petitioners is that under the rule of law applied by the Sixth Circuit here, legions of tort claims that should properly be prosecuted in state courts will now improperly be placed in the "deep freeze" of bankruptcy. A review of the statutory structure and of the subsequent events on remand in this case make clear that this alleged concern is vastly overstated. Although Section 1334(b) informs the threshold inquiry as to whether bankruptcy jurisdiction exists over particular claims, it in no way ends the inquiry as to whether bankruptcy jurisdiction will be exercised over them. Thus, after concluding that "related to" jurisdiction existed under Section 1334(b) over claims against the Co-defendants, the Sixth Circuit remanded for a determination as to whether it was appropriate under 28 U.S.C. § 1334(c) for the district court to abstain from hearing particular matters. As the Sixth Circuit noted in its opinion below, citing to its holding in *Salem*:

> [t]he abstention provisions of 28 U.S.C. § 1334(c) qualify Section 1334(b)'s broad grant of jurisdiction. It is for the district court to 'determine in each individual case whether hearing it would promote or impair efficient and fair adjudication of bankruptcy cases.'

Committee Pet. App. at 27a (citing *Salem, supra*).[8]

In sum, petitioners' policy concerns are as exaggerated as their legal issues are premature. Accordingly, the Court should decline to review this case.

---

[8] *See also Wood v. Wood (In re Wood)*, 825 F.2d 90, 93 (5th Cir. 1987) ("the abstention provisions of the Act demonstrate the intent of Congress that concerns of comity and judicial convenience should be met, not by rigid limitations on the jurisdiction of federal courts, but by the discretionary exercise of abstention when appropriate in a particular case); *Miller v. Kemira (In re Lemco Gypsum, Inc.)*, 910 F.2d 784, 788 n.16 (11th Cir. 1990) ("[w]e agree with the Fifth Circuit's opinion in *Wood* that the abstention provisions of 28 U.S.C. § 1334(c)(1) (1988) at least partially address the comity issue and obviate the need for an overly restrictive interpretation of the jurisdictional grant of § 1334(b)").

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS E. PITTS, JR.
SHELLEY C. CHAPMAN
SIDLEY & AUSTIN
875 Third Avenue
New York, NY 10022
(212) 906-2000

JUDY O'NEILL
LAURA J. EISELE
DYKEMA GOSSETT PLLC
400 Renaissance Center
Detroit, MI 48243
(313) 568-6800

CARTER G. PHILLIPS *
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

LARRY J. NYHAN
JAMES F. CONLAN
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7000

Counsel for Respondents Baxter International Inc. and Baxter Healthcare Corporation

November 27, 1996

* Counsel of Record

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 95-CV-72397-DT
HON. DENISE PAGE HOOD

IN RE: DOW CORNING CORPORATION,
Debtor.

MEMORANDUM OPINION AND ORDER ON REMAND REGARDING SECTION 1334(C) ABSTENTION

I. INTRODUCTION:

This matter is before the Court on remand from the United States Court of Appeals for the Sixth Circuit. *In re: Dow Corning Corporation*, Nos. 95-2034/2082/2084/2106/2107, 86 F.3d 482 (6th Cir. 1996) (Amended). This Court previously entered an order finding that it did not have subject matter jurisdiction over the tort claims against the nondebtor defendants pursuant to 28 U.S.C. § 157(b)(5). The Sixth Circuit reversed this Court's determination on this issue and found that this Court had subject matter jurisdiction over the tort claims pending against the nondebtor defendants pursuant to 28 U.S.C. § 157(b)(5). The Sixth Circuit remanded this case on the issue of whether or not this Court should abstain from the tort claims against the nondebtors pursuant to 28 U.S.C. § 1334(c)(1) and/or (2).

II. ANALYSIS:

A. *Whether this Court must abstain or, alternatively, exercise its discretion to abstain pursuant to 28 U.S.C. § 1334(c).*

1. *Mandatory Abstention.*

The Sixth Circuit has concluded that this Court has "related to" jurisdiction pursuant to 28 U.S.C. § 1334(b) over the actions pending against the nondebtors Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter, and Bristol-Myers Squibb in nonbankruptcy forums nationwide. *In re Dow Corning Corp., supra* at 494. In a section 157(b)(5) motion, an abstention analysis is required. *In re Pan American Corp.*, 950 F.2d 839, 844 (2nd Cir. 1991); *In re Dow Corning Corp., supra* at 497. The Tort Claimants' briefs and other claimants' objections and responses to the nondebtors' motions under Section 157(b)(5) requested this Court to abstain under 28 U.S.C. § 1334(c).

Section 1334(c) qualifies Section 1334(b)'s broad grant of jurisdiction. *In re Dow Corning Corp.* at 497. There are two types of abstention under Section 1334(c): discretionary abstention under 28 U.S.C. § 1334(c)(1) and mandatory abstention under 28 U.S.C. § 1334(c)(2). *Id.* Mandatory abstention will be addressed first.

In order for mandatory abstention to apply, a proceeding must: 1) be based on a state law claim or cause of action; 2) lack a federal jurisdictional basis absent the bankruptcy; 3) be commenced in a state forum of appropriate jurisdiction; 4) be capable of timely adjudication; and 5) be a non-core proceeding. *Id.*

As to the first factor, the claims and causes of action at issue against the nondebtors are personal injury tort claims which are essentially state law claims. Addressing the second factor, this Court notes that the Sixth Circuit held that this Court has "related to" bankruptcy jurisdic-

tion over the nondebtors. The personal injury tort actions against the nondebtors are not proceedings which need a determination under the bankruptcy laws and do not arise in a bankruptcy case. Absent the bankruptcy of the debtor in this matter, this Court would lack federal jurisdiction over the actions against the nondebtors.[1] With respect to the third factor, there have been no allegations that the actions against the nondebtors have not been commenced in a state forum of appropriate jurisdiction. Satisfying the fourth factor, the parties have informed the Court that there are numerous cases ready for trial against the nondebtors. Furthermore, the Honorable Sam C. Pointer, Jr. in his March 19, 1996 (Order 29) and April 16, 1996 (Order 29B) orders and the Multidistrict Litigation Panel's April 10, 1996 Conditional Remand Order, indicate there are numerous cases against the nondebtors which are indeed ready for trial.

Considering the fifth factor, the Court must determine whether the actions against the nondebtors are non-core proceedings. There are two categories of core proceedings: proceedings "arising under" title 11 and proceedings "arising in" title 11. *In re Harris Pine Mills*, 44 F.3d 1431, 1435 (9th Cir. 1995), *cert. denied*, 115 S.Ct. 2555 (1995). Proceedings "arising under" title 11 "involve a cause of action created or determined by a statutory provision of title 11." *Id.* Proceedings "arising in" title 11 are a reference to those "administrative" matters that

---

[1] The only cases against the nondebtors over which this Court would have jurisdiction, sitting in the Eastern District of Michigan, are those cases that involve complete diversity. The Court notes that most of the cases involving the nondebtors also include the Debtor Dow Corning Corporation which would defeat this Court's diversity jurisdiction. (*See* the Court's Discretionary Abstention analysis, *infra*.) The Court notes that mandatory abstention also apply to removed cases. *William v. Shell Oil Co.*, 169 B.R. 684, 690-691 (S.D. Cal. 1994). The Court further notes that absent the bankruptcy, the Court has no jurisdiction over the cases against the nondebtors where the claims arose outside of the Eastern District of Michigan.

arise only in bankruptcy cases and are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy. *Id.* Section 157(b)(2) provides a nonexclusive list of proceedings which are core proceedings. Non-core proceedings are only "related to" a case under title 11. *Id.* at 1435. A non-core proceeding "does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy." *Id.*

Personal injury tort or wrongful death claims are excluded from the catalog of core proceedings by 28 U.S.C. § 157(b)(2)(B) and (O) which state in pertinent part:

> (b)(2) Core proceedings include, but are not limited to—
>
> * * *
>
> (B) allowance or disallowances of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 *but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;*
>
> (O) other proceedings affecting the liquidation of assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, *except personal injury tort or wrongful death claims.*

28 U.S.C. § 157(b)(2)(B) and (O) (emphasis added). *In re Hughes*, 98 B.R. 115, 118 (D.C. 1988). The actions against the nondebtor defendants are non-core proceedings under 28 U.S.C. § 157.

Section 157(b)(4) provides that "[n]on-core proceedings under § 157(b)(2)(B) of title 28 [liquidation of personal injury tort or wrongful death cases], shall *not* be subject to the mandatory abstention provisions of Section 1334(c)(2)." *In re Pan Am*, 950 F.2d at 845; 28

U.S.C. § 157(b)(4). As indicated above, the non-core proceedings included in Section 157(b)(2)(B) are "liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims *against the estate* for purposes of distribution in a case under title 11." (Emphasis added). Here, the personal injury and/or wrongful death tort actions are *not* "against the estate" of the debtor but against the nondebtors. Consequently, the non-core proceedings and actions against the nondebtors are *not* exempt from mandatory abstention under Section 157(b)(4). Moreover, 28 U.S.C. § 1334(c)(2) provides for mandatory abstention in cases involving state law claims for which the sole basis of bankruptcy jurisdiction is "related to" jurisdiction. *Celotex Corp. v. Edwards*, 115 S.Ct. 1493, 1506, note 10 (1995) (Stevens, J., dissenting). In the instant case, the Sixth Circuit held that this Court had Section 1334(b) or "related to" jurisdiction over the actions pending against the nondebtors in nonbankruptcy forums nationwide. *In re Dow Corning, supra* at 494. Based on the above, the Court finds that the four factors calling for mandatory exemption under Section 1334(c)(2) have been met.

2. *Discretionary Abstention.*

Alternatively, the Court exercises its discretion to remand pursuant to 28 U.S.C. § 1334(c)(1). Section 1334(c)(1) provides:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

In *In re White Motor Credit*, 761 F.2d 270 (1985), the Sixth Circuit noted:

> . . . federal courts should be hesitant to exercise jurisdiction when state issues substantially predomi-

> nate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought.

Id. at 274 (quotations omitted). Here, the personal injury/tort claims against the nondebtors are predominantly state law claims. The proof and scope of issues in dispute and the comprehensiveness of the remedies sought varies state to state. The Sixth Circuit in *In re White Motor* further noted that:

> . . . in large bankruptcy cases with hundreds or even thousands of tort litigants beating on the door of one federal judge, . . . at least judicial economy and expeditiousness, may depend on the court's authority to refer cases to other courts. Since the 1984 Bankruptcy Act prevents reference of these tort cases to bankruptcy courts, as in the past, it makes good sense to give the district courts wide latitude in referring the cases through abstention to other courts.

Id. The Court finds that discretionary abstention from the cases against the nondebtors would best serve the interest of justice and comity. Waiting until the estimation and confirmation of a plan of reorganization before the actions against the nondebtors are liquidated would not result in a more precise estimation of the assets needed by the debtor's estate to cover any indemnification and contribution claims against the debtor's estate. The estimation of any possible indemnification and contribution claims by the nondebtors against the debtor's bankruptcy estate would not be any different than if the cases against the nondebtors proceed to trial at this stage. To the contrary, as the various trials proceed against the nondebtors, a clearer picture would emerge as to whether the nondebtors would have any indemnification or contribution claims against the debtor's estate.

The Sixth Circuit opinion addresses the Joint Insurance issue between Dow Corning, Dow Chemical and Corning

Incorporated finding that the Court had "related to" jurisdiction based on the Joint Insurance between the parties. The Sixth Circuit opinion does not address the Joint Insurance issue as it pertains to the abstention issue. This Court addresses this issue as it relates to the interest of justice and comity issues which must be addressed in an analysis of discretionary abstention. Although Dow Chemical has apparently notified insurers that it is asserting claims against the jointly-held policies, it has been argued that as to Dow Chemical, the joint policies are in fact excess policies and that Dow Chemical has sufficient primary insurance. (Ex. A, p. 5, Official Committee of Tort Claimants' Brief, filed June 7, 1996). The Sixth Circuit's opinion addresses the insurance issue from the point of view of whether the Debtor's estate will have sufficient resources. The Debtor itself has not put forth proof that its estate would be dissipated based upon the "threat" posed to those insurance policies by Dow Chemical and Corning Incorporated. In *The Matter of Zale Corp.*, 62 F.3d 746 (5th Cir. 1995), the Fifth Circuit found that even if the bankruptcy court had "related to" jurisdiction over certain insurance policies with indemnification contracts, a nondebtor should not be shielded by the powers of the bankruptcy court. *Id.* at 760-761. The Bankruptcy Code discharges the Debtor's liabilities and not those owed by third parties. *Id.* at 760, notes 42, 43, and 44; 11 U.S.C. § 524(e). If the Court does not abstain from the tort claims against the nondebtors, the tort claims against the nondebtors would effectively be determined by this Court which would be contrary to 11 U.S.C. § 524(e). Section 524(e) does not allow the Bankruptcy Code to be used to discharge the debts of nondebtors. *Id.*, at 760, notes 42, 43, and 44. The Court finds that the "threat" posed to the insurance policies by the nondebtors does not overcome factors in favor of discretionary abstention. Specifically, the Court finds the interests of justice and comity weigh in favor of discretionary abstention.

III. CONCLUSION:

This Court finds that the cases against the nondebtors are subject to mandatory abstention under 28 U.S.C. § 1334(c)(2). Alternatively, the Court finds that in the interest of justice, comity and judicial economy, it will exercise its discretion to abstain from the cases against the nondebtors under 28 U.S.C. § 1334(c)(1).

Accordingly,

IT IS ORDERED that the actions against the nondebtor defendants are subject to mandatory abstention under 28 U.S.C. § 1334(c)(2); alternatively,

IT IS ORDERED that the Court will exercise its discretion to ABSTAIN from the cases against the nondebtors under 28 U.S.C. § 1334(c)(1).

DATED: Jul. 30, 1996

/s/ Denise Page Hood
DENISE PAGE HOOD
United States District Judge

(H) (4)

Nos. 96-330 & 96-742

Supreme Court, U.S.
FILED
NOV 27 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

OFFICIAL COMMITTEE OF TORT CLAIMANTS, *Petitioner*,

—v.—

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, CORNING INCORPORATED, BAXTER INTERNATIONAL INCORPORATED, MINNESOTA MINING AND MANUFACTURING COMPANY, BRISTOL-MYERS SQUIBB COMPANY AND MEDICAL ENGINEERING CORPORATION, *Respondents*.

BREAST IMPLANT TORT CLAIMANTS REPRESENTED BY O'QUINN, KERENSKY, MCANINCH & LAMINACK, *Petitioners*,

—v.—

DOW CORNING CORPORATION, *et al.*, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT MINNESOTA MINING AND MANUFACTURING COMPANY

Bruce R. Zirinsky
Counsel of Record
Greg A. Danilow
Howard B. Comet
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Counsel for Respondent, Minnesota Mining and Manufacturing Company

46pp

QUESTIONS PRESENTED

1. Whether the Sixth Circuit erred in ruling that the United States District Court for the Eastern District of Michigan had subject matter jurisdiction pursuant to 28 U.S.C. § 1334(b) over silicone gel breast implant claims pending against non-debtor codefendants because such claims were "related to" the chapter 11 case of Dow Corning Corporation.

2. Whether the Sixth Circuit erred in ruling that the United States District Court for the Eastern District of Michigan had the power under 28 U.S.C. § 157(b)(5) to fix the venue for trial of silicone gel breast implant claims pending against nondebtor codefendants which are "related to" the chapter 11 case of Dow Corning Corporation.

LIST OF PARTIES

In addition to the parties listed in the caption, the following are parties to the proceeding in the Sixth Circuit: Baxter Healthcare Corporation; Heidi Lindsey; Johnson County, Texas, Plaintiffs; Breast Implant Tort Claimants Represented by O'Quinn, Kerensky, McAninch & Laminack; Mississippi Physicians; and Official Committee of Unsecured Creditors, as Intervenor.

RULE 29.6 LISTING

Pursuant to Supreme Court Rule 29.6, respondent Minnesota Mining and Manufacturing Company states that it does not have a parent company. Its subsidiaries (other than wholly owned subsidiaries) are Eastern Heights State Bank of St. Paul (Minn.), Sumitomo 3M Limited (Japan), 3M Health Care Limited (Japan), 3M Korea Limited (Korea), and Birla 3M Limited (India).

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
RULE 29.6 LISTING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
Background	3
Proceedings Below	4
A. The District Court	4
B. The Court of Appeals	6
REASONS FOR DENYING THE WRIT	7
I. THE PROCEDURAL POSTURE OF THE INTERLOCUTORY DECISION BELOW RENDERS THE ISSUES UNRIPE FOR REVIEW AT THIS TIME	8
II. THE PETITIONS FAIL TO DEMONSTRATE ANY COMPELLING REASON FOR THE COURT TO EXERCISE ITS DISCRETION TO GRANT CERTIORARI	12

PAGE

A. Petitioners Have Mischaracterized the Importance of the Questions Presented 12

B. The Decision Below Does Not Present Any Conflict With Decisions of the Courts of Appeals or This Court 14

1. The *Pacor* Decision 14

2. The *Fedpak* Decision 17

3. Other Circuit Court Decisions..... 18

4. The *Celotex* Decision..... 19

5. No Misapplication of Law..... 22

C. The Sixth Circuit Correctly Interpreted 28 U.S.C. § 157(b)(5)..... 23

CONCLUSION..... 28

APPENDIX..... RA 1

TABLE OF AUTHORITIES

Cases	PAGE
Abbott Lab. v. Gardner, 387 U.S. 136 (1967)	9
In re A.H. Robins Co., 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989)	28
In re A.H. Robins Co., No. 85-01307-R (E.D. Va. Nov. 9, 1985)	26-27
A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.), 788 F.2d 994 (4th Cir. 1985), *cert. denied*, 479 U.S. 876 (1986)	24-27
American Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951)	25
Anderson v. Green, 115 S. Ct. 1059 (1995)	9
Blanchette v. Connecticut Gen. Ins. Corp. (Regional Rail Reorganization Act Cases), 419 U.S. 102 (1974)	9
Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R. Co., 389 U.S. 327 (1967)	10 n.3
Catlin v. United States, 324 U.S. 229 (1945)	10
Celotex Corp. v. Edwards, 115 S. Ct. 1493 (1995)	8, 13, 14, 19-21, 25
City of Okla. City v. Tuttle, 471 U.S. 808 (1985)	8-9
Cobbledick v. United States, 309 U.S. 323 (1940)	9
In re Fedpak Sys., Inc., 80 F.3d 207 (7th Cir. 1996)	14, 17-18
Goldstein v. Cox, 396 U.S. 471 (1970)	10

PAGE

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 9, 10 n.3, 11

Hanna v. Philadelphia Asbestos Co., 743 F.2d 996 (3d Cir. 1984) 16

Kelley v. Nodine (In re Salem Mortgage Co.), 783 F.2d 626 (6th Cir. 1986) 12-13

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 12

Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.) (MDL 926)), No. CV94-P-1558-S (N.D. Ala. 1995) 4

Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig., No. CV 92-P-10000-S, MDL No. 926, Civ. A. No. CV94-P-11558-S, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994) 4

Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (In re Dow Corning Corp.), Nos. 96-2005, 96-2008 to 96-2013 (6th Cir. Sept. 24, 1996) 7

Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (In re Dow Corning Corp.), 86 F.3d 482 (6th Cir.), *petition for cert. filed*, 65 U.S.L.W. 3167 (U.S. Aug. 28, 1996) (No. 96-330) 1

In re Marcus Hook Dev. Park Inc., 943 F.2d 261 (3d Cir. 1991) 17 n.5

Mercer v. Theriot, 377 U.S. 152 (1964) 10 n.3

Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.), 910 F.2d 784 (11th Cir. 1990) 18-19 n.6

PAGE

Murray v. Pan Am. World Airways, Inc. (In re Pan Am Corp.), 16 F.3d 513 (2d Cir. 1994) 27

Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984).....8, 13, 14-20

Quackenbush v. Allstate Ins. Co., 116 S. Ct. 1712 (1996) 14

Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43 (1993) 9

In re Silicone Gel Breast Implants Prods. Liab. Litig., MDL No. 926, 793 F. Supp. 1098 (J.P.M.L. 1992) 3-4

Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985) 9

Turner v. Ermiger (In re Turner), 724 F.2d 338 (2d Cir. 1983) 18 n.6

United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988)..... 25

United States v. Nobles, 422 U.S. 225 (1975) 12

Virginia Military Inst. v. United States, 508 U.S. 946 (1993) 9-10

Constitution, Statutes

U.S. Const. art. III, § 2, cl. 1..... 9

11 U.S.C. § 101(5) 23

11 U.S.C. § 105(a).....24 n.10

11 U.S.C. § 362 21

11 U.S.C. § 362(a) 4

PAGE

11 U.S.C. § 541(a) 24 n.8

28 U.S.C. § 157(b)(2)(B) 24

28 U.S.C. § 157(b)(5) ..... *passim*

28 U.S.C. § 1254(1) 9

28 U.S.C. § 1334(b) ..... *passim*

28 U.S.C. § 1334(c) 7, 13

28 U.S.C. § 1334(c)(1) 7

28 U.S.C. § 1334(c)(2) 7

28 U.S.C. § 1334(e) 24 n.10

Sup. Ct. R. 10 11

Uniform Contribution Among Tortfeasors Act § 1(b), 12 U.L.A. 194 (1996) 23 n.9

Legislative Materials

H.R. Rep. No. 95-595, at 51 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6012 13

130 Cong. Rec. H7492 (daily ed. June 29, 1984) 24

Other Authorities

18 Am. Jur. 2d *Contribution* § 9 (1985) 23 n.9

3 Fowler V. Harper et al., *The Law of Torts* § 10.1 (2d ed. 1986) 16

Respondent, Minnesota Mining and Manufacturing Company ("3M") respectfully requests that this Court deny the petitions for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit (the "Petitions") seeking review of the Sixth Circuit's decision in *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir.), *petition for cert. filed*, 65 U.S.L.W. 3167 (U.S. Aug. 28, 1996) (No. 96-330).

OPINIONS BELOW

The opinion of the Sixth Circuit (Tort Comm. Pet. App. 1a-28a),[1] is reported at 86 F.3d 482 (6th Cir. 1996). On June 3, 1996, the Sixth Circuit issued its mandate and denied petitions for rehearing and rehearing en banc (*id.* at 65a-66a). The initial opinions of the United States District Court for the Eastern District of Michigan (*id.* at 29a-64a) are reported at 187 B.R. 919 (E.D. Mich. 1995) and 187 B.R. 934 (E.D. Mich. 1995). The opinion of the United States District Court for the Eastern District of Michigan on remand (App., *infra*, RA 1-RA 8) is unreported.

STATUTORY PROVISIONS INVOLVED

The principal statutory provisions involved are:

28 U.S.C. § 1334(b), which provides:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil

---

[1] "Tort Comm. Pet. App." refers to the appendix to the Petition for a Writ of Certiorari of the Offical Committee of Tort Claimants.

> proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 157(b)(5), which provides:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

STATEMENT OF THE CASE

Dow Corning Corporation ("DCC") was the predominant producer of silicone gel breast implants until it ceased their manufacture in 1992. Because thousands of recipients of silicone gel breast implants asserted claims for compensatory and punitive damages in federal and state court actions against DCC, on May 15, 1995, DCC was forced to file for protection under chapter 11 of title 11, United States Code (the "Bankruptcy Code"), in the United States Bankruptcy Court for the Eastern District of Michigan.

On the date DCC commenced its chapter 11 case, over 7,000 implant lawsuits, representing the claims of over 15,000 plaintiffs, had been filed against respondent 3M, which ceased manufacturing breast implants in 1984. Record 265.[2] DCC has been named as a codefendant with 3M in over 5,000 of those 7,000 lawsuits. *Id.* In virtually every case, plaintiffs asserted claims of joint and several liability against 3M and DCC for the full amount of their asserted damages. *Id.* Additionally, in approximately 60% of the cases against 3M, the plaintiff received multiple sets of breast implants in a series of separate operations, including implants made by

---

[2] "Record __" refers to the Record filed in connection with the decision below.

3M and at least one other manufacturer, which included DCC in most cases. Record 473.

Thousands of other cases were also filed against Bristol-Myers Squibb Corporation and Medical Engineering Corporation (together "Bristol-Myers"), Baxter International Incorporated and Baxter Healthcare Corporation (together "Baxter"), as well as other defendants, including the 50% shareholders of DCC, The Dow Chemical Company ("Dow Chemical") and Corning Incorporated ("Corning," and collectively with 3M, Bristol-Myers, Baxter, and Dow Chemical, the "Nondebtor Codefendants"). As with the cases against 3M, many of the cases against the other Nondebtor Codefendants also named DCC as a codefendant, asserted joint and several liability, and involved implants from multiple manufacturers.

The decision below held that the claims against the Nondebtor Codefendants were related to DCC's reorganization case within the meaning of 28 U.S.C. § 1334(b) because DCC's successful reorganization would be directly impacted by the resolution of the thousands of claims for indemnification and contribution generated by the breast implant actions, including claims asserted by the Nondebtor Codefendants against DCC and vice versa.

Background

Prior to DCC's chapter 11 filing, on June 25, 1992, the Judicial Panel on Multidistrict Litigation (the "MDL Panel") ordered the centralization of pretrial proceedings in all of the thousands of federal breast implant actions that have been filed against DCC and the Nondebtor Codefendants, and transferred the actions to Chief Judge Pointer of the Northern District of Alabama (the "Multidistrict Court"). *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL No. 926, 793 F. Supp. 1098, 1099-1101 (J.P.M.L. 1992). The MDL Panel

found that these actions involve complex common questions of fact and that centralization would best serve the convenience of the parties and witnesses, promote the just and efficient conduct of litigation, avoid duplication of discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary. *Id.*

On March 23, 1994, a proposed class action settlement (the "1994 Settlement") was reached among DCC, the Nondebtor Codefendants, and the plaintiffs' steering committee, and was approved by the Multidistrict Court by order dated September 1, 1994. *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.)*, No. CV 92-P-10000-S, MDL No. 926, Civ. A. No. CV94-P-11558-S, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994). By mid-1995, however, it became apparent that the funds provided for in the 1994 Settlement would be inadequate to fund the claims filed by plaintiffs who alleged, but had not proved, any causation between silicone gel breast implants and any alleged disease or injury. *Id.*

On December 22, 1995, the Multidistrict Court approved a revised version of the 1994 Settlement, which did not include DCC. *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig. (MDL 926))*, No. CV 94-P-11558-S (N.D. Ala. 1995) (Order No. 27 approving revised settlement program and injunctions). Various appeals have been taken regarding the revised settlement, which are currently pending in the Eleventh Circuit.

Proceedings Below

A. The District Court

As a result of DCC's chapter 11 filing on May 15, 1995, the silicone gel breast implant actions of plaintiffs who had, at that time, opted out of the 1994 Settlement (collectively, the "Implant Actions") were automatically stayed from prosecution against DCC pursuant to 11 U.S.C. § 362(a). The

Implant Actions against the Nondebtor Codefendants, however, were not stayed despite the fact that in most cases joint and several liability was asserted against DCC and one or more of the Nondebtor Codefendants.

In June 1995, DCC and the Nondebtor Codefendants filed separate motions pursuant to 28 U.S.C. § 157(b)(5) to transfer to the District Court for the Eastern District of Michigan (the "District Court") the claims asserted in pending federal and state court Implant Actions in which DCC was a party (collectively, the "Implant Claims"). Specifically, on June 12, 1995, DCC moved to transfer to the District Court the Implant Claims pending against it and its shareholders, Dow Chemical and Corning, indicating that it would seek to have the transferred claims consolidated for a threshold jury trial on the issue of whether silicone gel breast implants caused the diseases which were alleged. Record 2. Dow Chemical and Corning joined in DCC's motion. *Id.* Similarly, on June 14, 1995, 3M, Baxter, and Bristol-Myers each filed a motion to transfer the Implant Claims asserted in Implant Actions in which the respective Nondebtor Codefendants were named as codefendants with DCC. Record 6, 15. No request to transfer was made in cases in which DCC was not involved.

By memorandum opinion and order, dated September 12, 1995 (Tort Comm. Pet. App. 29a-56a), the District Court asserted jurisdiction under 28 U.S.C. § 1334(b) with respect to the Implant Claims pending against DCC and permitted transfer of such claims pursuant to 28 U.S.C. § 157(b)(5), without ordering the generic causation trial that DCC had requested. Record 389. However, the District Court denied DCC's motion to the extent it related to claims against its corporate shareholders, Dow Chemical and Corning. *Id.*

By separate memorandum opinion and order, dated September 12, 1995 (Tort Comm. Pet. App. 57a-64a), the District Court denied all of the Nondebtor Codefendants' § 157(b)(5) transfer motions on the ground that it lacked subject matter

jurisdiction over the Implant Claims against the Nondebtor Codefendants pursuant to 28 U.S.C. § 1334(b) because such claims were not "related to" DCC's bankruptcy. Record 388.

B. The Court of Appeals

Applying the broad jurisdictional grant of 28 U.S.C. § 1334(b), the Sixth Circuit reversed the District Court's determination that it lacked subject matter jurisdiction over the Implant Claims against the Nondebtor Codefendants and that it did not have the power to transfer those claims pursuant to 28 U.S.C. § 157(b)(5). Tort Comm. Pet. App. 28a.

In reaching its holding, the Sixth Circuit concluded that its decision would "further the prompt, fair, and complete resolution of all claims 'related to' bankruptcy proceedings and harmonize Section 1334(b)'s broad jurisdictional grant with the oft-stated goal of centralizing the administration of a bankruptcy estate." *Id.* at 26a. Because the joint liability claims pending against DCC and the Nondebtor Codefendants give rise to contingent claims for indemnification or contribution among all of the defendants, including DCC, which could ripen into fixed claims, the potential that DCC will be held liable to the Nondebtor Codefendants for indemnification or contribution, or vice versa, "suffices to establish a conceivable impact" on DCC's estate. *Id.* at 20a.

The Sixth Circuit believed that in the event plaintiffs were to prevail on their respective claims against the Nondebtor Codefendants, the possibility of liability for contribution or indemnification was "far from attenuated." *Id.* at 21a. Accordingly, the Sixth Circuit concluded that there is § 1334(b) subject matter jurisdiction over the Implant Claims against the Nondebtor Codefendants because claims for indemnification or contribution, whether asserted against or by DCC, would "affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as [DCC's] ability to resolve its liabilities and proceed with

reorganization." *Id.* at 20a. The Sixth Circuit refrained, however, from addressing the issue of abstention under 28 U.S.C. § 1334(c) in the first instance and remanded to the District Court for further case by case proceedings on that issue. *Id.* at 28a.

On July 30, 1996, the District Court abstained from adjudicating all the Implant Claims against the Nondebtor Codefendants pursuant to 28 U.S.C. § 1334(c)(1) and (2). App., *infra*, RA 1. The Nondebtor Codefendants have appealed that decision to the Sixth Circuit (the "Abstention Appeal"). Record 552, 553, 557, 560, 563, 566, 567. When petitioner Official Committee of Tort Claimants (the "Tort Committee") moved to dismiss the Abstention Appeal on jurisdictional grounds, the Sixth Circuit ordered that the jurisdictional issue be argued along with the merits of the appeal and established an expedited briefing schedule. *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (In re Dow Corning Corp.)*, Nos. 96-2005, 96-2008 to 96-2013, slip op. at 2 (6th Cir. Sept. 24, 1996). Final briefs were filed on November 19, 1996. Oral argument has not yet been scheduled.

REASONS FOR DENYING THE WRIT

The procedural posture of the decision below weighs heavily against petitioners' request for a writ of certiorari. The questions presented are not ripe for review at this time because the Nondebtor Codefendants are currently appealing from the District Court's decision, on remand, to abstain from exercising its subject matter jurisdiction over the Implant Claims against the Nondebtor Codefendants. As a result, unless and until the District Court's abstention decision is reversed, there is no controversy for the Court to resolve. On the other hand, in the event the District Court's abstention decision is affirmed or the appeal is dismissed, a decision by this Court would be an advisory opinion rendered in the absence of an actual case or controversy.

Moreover, petitioners have failed to demonstrate any compelling reason that would warrant this Court's review. While the issues are of importance to the parties to the proceeding, they are of minimal importance to the development of the law. Petitioners have also failed to demonstrate the existence of a conflict of decisions among the courts of appeals. In its decision, the Sixth Circuit neither criticized nor refused to follow the decisions of other circuit courts of appeals. In fact, the Sixth Circuit expressly stated that it adopted the Third Circuit's test established in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), for determining whether a proceeding is related to a bankruptcy case under 28 U.S.C. § 1334(b).

Not only is the decision below consistent with those circuit court decisions alleged by petitioners to be conflicting, but it also is completely consistent with this Court's decision in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995). Notwithstanding petitioners' assertion of an alleged conflict of decisions, the errors asserted essentially consist of the "misapplication," in petitioners' view, of a properly stated rule of law. This clearly does not constitute a compelling reason for certiorari review.

Finally, petitioners have failed to demonstrate that the Sixth Circuit misapplied either (i) 28 U.S.C. § 1334(b) by ruling that the Implant Claims against the Nondebtor Codefendants were related to DCC's bankruptcy case, or (ii) 28 U.S.C. § 157(b)(5) by ruling that the District Court had the power to fix venue for trial of the Implant Claims against the Nondebtor Codefendants.

I. THE PROCEDURAL POSTURE OF THE INTERLOCUTORY DECISION BELOW RENDERS THE ISSUES UNRIPE FOR REVIEW AT THIS TIME

The decision to grant certiorari "represents a commitment of scarce judicial resources." *City of Okla. City v. Tuttle*, 471

U.S. 808, 816 (1985). In this regard, the ripeness doctrine prevents the courts, "through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Lab. v. Gardner*, 387 U.S. 136, 148 (1967). It is a principle of timing in which the Court must look at the situation at the present time rather than at the time of the decision below. *Anderson v. Green*, 115 S. Ct. 1059, 1060 (1995) (citing *Blanchette v. Connecticut Gen. Ins. Corp. (Regional Rail Reorganization Act Cases)*, 419 U.S. 102, 140 (1974)). The doctrine is often used where future events may affect the justiciable nature of a controversy, making it more apt for review at a later date. *See, e.g., Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985). Thus, an action must be sufficiently mature so that it is considered an actual case or controversy as required by Article III of the United States Constitution. U.S. Const. art. III, § 2, cl. 1; *see also Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993) ("ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction").

Although the Court has jurisdiction to review interlocutory judgments of federal courts of appeals, *see* 28 U.S.C. § 1254(1), the Court will generally not exercise its jurisdiction before a final judgment is issued in the lower courts. *See, e.g., Virginia Military Inst. v. United States*, 508 U.S. 946 (1993); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree"); *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

The Court has frequently determined that issues remanded by courts of appeals were unfit for review pending final judgment and subsequent court of appeals review. For example, in *Virginia Military Institute v. United States*, 508 U.S. 946 (1993), the Court denied certiorari to review a decision of the court of appeals which remanded the case to the district court for the determination of an appropriate remedial course in

the matter under review. *Id.* In refusing to grant the writ, the Court stated "[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction." *Id.*[3]

Consistent with these cases, the questions presented in the Petitions are not ripe for Supreme Court resolution in light of the pending appeal from the District Court's decision to abstain from exercising its subject matter jurisdiction. In the event the Sixth Circuit either affirms or declines to review the District Court's abstention decision, the questions presented in the Petitions will become moot. The issues of related to jurisdiction under 28 U.S.C. § 1334(b) and transfer pursuant to 28 U.S.C. § 157(b)(5) will not be appropriate for certiorari review until and unless the Sixth Circuit reverses the District Court's abstention decision. If the Sixth Circuit either (1) dismisses the appeal on jurisdictional grounds or (2) affirms on the merits, no Implant Claims against the Nondebtor Codefendants will be transferred, and there will be no actual controversy for this Court to consider.

Moreover, in the event the Sixth Circuit issues a final judgment on the abstention issues, there is a significant likelihood that a subsequent petition for a writ of certiorari will be filed. Accordingly, denial of petitioners' request for a writ of certiorari at this time further serves the federal policy against piecemeal litigation. *See Catlin v. United States*, 324 U.S. 229, 233-34 (1945); *see also Goldstein v. Cox*, 396 U.S. 471, 478 (1970) ("In the absence of clear and explicit authorization by Congress, piece-meal appellate review is not favored.").

---

[3] *See also Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *cf. Mercer v. Theriot*, 377 U.S. 152, 153 (1964) (Court initially denied certiorari where court of appeals remanded case until subsequent rulings were issued by district court and court of appeals); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (Court refused to review interlocutory decree and did not grant writ until second appeal after final decree).

Petitioners clearly will not suffer any hardship by a denial of certiorari at this time. As a result of the District Court's decision to abstain from exercising subject matter jurisdiction over the Implant Claims against the Nondebtor Codefendants, petitioners have thus far obtained their desired result. That is, the Implant Claims against the Nondebtor Codefendants have not been transferred to the District Court. Petitioners thus cannot argue that the decision below has affected them in any concrete manner. Withholding the Court's consideration of the questions presented at the present time would have absolutely no adverse effect on petitioners.

Accordingly, because petitioners have not suffered any injury, and any future effect of the decision below remains wholly speculative in light of the pending appeal from the District Court's abstention decision, the Court should deny certiorari as the questions presented are not ripe for review at this time.

II. THE PETITIONS FAIL TO DEMONSTRATE ANY COMPELLING REASON FOR THE COURT TO EXERCISE ITS DISCRETION TO GRANT CERTIORARI

The Court's review on a writ of certiorari is purely a matter of judicial discretion that is exercised "only for compelling reasons." Sup. Ct. R. 10. A petition for certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* Rather, the jurisdiction of the Court is "exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Here, the errors asserted by petitioners present no "compelling reasons" for review by the Court. Although petitioners attempt to create the appearance of a conflict between

circuits over an unsettled federal question of public importance, petitioners' reasons for review actually amount to nothing more than dissatisfaction with the Sixth Circuit's application of the rule regarding "related to" subject matter jurisdiction that has been adopted by virtually every circuit court of appeals. Accordingly, even if review at this time were not barred by the ripeness doctrine, the Petitions should nevertheless be denied.

A. Petitioners Have Mischaracterized the Importance of the Questions Presented

As the Court has observed, "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *see United States v. Nobles*, 422 U.S. 225, 241-42 n.16 (1975) ("In the absence of . . . an indication that the issues are of sufficient general importance to justify the grant of certiorari we decline to entertain them.").

In an effort to obtain review by the Court, petitioners have mischaracterized the Sixth Circuit's decision as a novel ruling effecting a "wholesale enlargement of the bankruptcy jurisdiction at the expense of state judicial authority." Tort Comm. Pet. 10. In actuality, however, the decision below represents nothing more than the application of well-settled and long-standing principles of law.

The so-called "enlargement" of bankruptcy jurisdiction by the Sixth Circuit in the decision below is entirely consistent with Congress's expansive grant of jurisdiction to the district courts in bankruptcy cases. In the decision below, the Sixth Circuit began with the "premise that the 'emphatic terms in which the jurisdictional grant is described in the legislative history, and the extraordinarily broad wording of the grant itself, leave us with no doubt that Congress intended to grant to the district courts broad jurisdiction in bankruptcy cases.' "

Tort Comm. Pet. App. 10a (quoting *Kelley v. Nodine (In re Salem Mortgage Co.)*, 783 F.2d 626, 634 (6th Cir. 1986)). In fact, in its most recent pronouncement on this issue, this Court has agreed that the congressional intent was to " 'grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.' " *Celotex Corp. v. Edwards*, 115 S. Ct. 1493, 1499 (1995) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)).

The decision below was premised upon the Sixth Circuit's fact-specific application of legal principles which have been adopted by this Court and every circuit court of appeals to consider the issue. Contrary to petitioners' concerns, the Sixth Circuit has not enlarged the jurisdiction of the bankruptcy courts; it merely found the existence of "related to" jurisdiction consistent with congressional intent.

In contending that the Sixth Circuit's application of this long-standing grant of jurisdictional power alters the way in which mass tort actions will be litigated in the future, petitioners ignore the abstention provisions under 28 U.S.C. § 1334(c). As Congress has indicated, "in order to insure that the jurisdiction of the bankruptcy court is exercised only when appropriate to the expeditious disposition of bankruptcy cases, the bill codifies present case law relating to the power of abstention in particular proceedings by the bankruptcy court." H.R. Rep. No. 95-595, at 51 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6012. Thus, statutory abstention enables the district court, in appropriate circumstances, to determine whether hearing a particular case would " 'promote or impair efficient and fair adjudication of bankruptcy cases' " in order to serve the interests of justice and judicial economy. Tort Comm. Pet. App. 27a (quoting *Salem*, 783 F.2d at 635).

Petitioners' concern with the "prospective impact" the decision below could have on the "fundamental division of judicial authority under familiar principles of the federal system" (Tort Comm. Pet. 10), thus does not directly involve

§ 1334(b) jurisdiction, as alleged by petitioners. Rather, it involves principles of abstention—the very issue that is currently pending before the Sixth Circuit in the Abstention Appeal.[4] As this Court has stated, "[f]ederal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism." *Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712, 1724 (1996). Any assertion concerning the impact of the decision below on the federal system will be addressed by the Sixth Circuit in the context of abstention and is thus premature and not ripe for review by the Court at this time.

Thus, contrary to petitioners' contention, the decision below does not represent a departure from existing law that alters the way in which mass tort actions will be litigated.

B. The Decision Below Does Not Present Any Conflict With Decisions of the Courts of Appeals or This Court

Because a conflict with decisions of circuit courts of appeals or this Court could constitute a "compelling reason" warranting certiorari, petitioners construct an illusory conflict between the Sixth Circuit decision below and the Third and Seventh Circuit decisions in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984) and *In re Fedpak Systems, Inc.*, 80 F.3d 207 (7th Cir. 1996), respectively, and this Court's decision in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995).

1. The *Pacor* Decision

Contrary to petitioners' assertion that the decision below conflicts with the Third Circuit decision in *Pacor*, the Sixth Circuit explicitly adopted the test established in *Pacor*, stat-

---

[4] In the Abstention Appeal, 3M has urged reversal on the grounds that the District Court misapplied the congressionally imposed statutory criteria for bankruptcy abstention and ignored the letter and spirit of the Sixth Circuit's holding in the decision below.

ing: "Our Circuit adopted the *Pacor* test for determining whether a civil proceeding is 'related to' a bankruptcy proceeding under Section 1334(b)." Tort Comm. Pet. App. 11a.

In *Pacor*, the Third Circuit adopted the following test for determining the existence of "related to" jurisdiction:

> The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding *could conceivably have any effect on the estate being administered in bankruptcy*. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome *could alter* the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which *in any way impacts upon the handling and administration of the bankrupt estate*.

Pacor, 743 F.2d at 994 (emphasis added) (citations omitted).

Under the facts of that case, the Third Circuit concluded that an action between a tort plaintiff and a supplier of asbestos was not related to the bankruptcy case of the Johns-Manville Corporation, the alleged manufacturer of the asbestos. The fact that *Pacor* held that related to jurisdiction did not exist in that case, however, does not establish that the Third Circuit's decision is in conflict with the Sixth Circuit's decision below. On the contrary, as stated above, the decision below is entirely consistent with the test established in *Pacor*. After expressly stating that it adopted the *Pacor* test, the Sixth Circuit applied the *Pacor* test to the facts of DCC's bankruptcy to reach its holding that all Implant Claims, including those brought against respondent, could well alter the debtor's liability and thus have an effect on DCC's estate.

Petitioners' perceived conflict stems from the different factual circumstances in the two cases. The distinction that the Third Circuit drew in *Pacor* between the plaintiff's claim

against the supplier and the supplier's claim-over against Manville cannot be drawn in the case at bar in light of the intertwined nature of the Implant Claims against the Nondebtor Codefendants and the Nondebtor Codefendants' claims-over against DCC. In *Pacor*, there was no allegation that plaintiff had been injured by the joint conduct of the supplier and Manville or that the liability of the supplier and Manville was joint and several. Plaintiff sued only the supplier; it did not sue both the supplier and Manville. In fact, in a companion case to *Pacor* involving similar facts, the Third Circuit described the relationship as follows: "The [plaintiff-supplier] action and the [supplier]-Manville action are two *separate and distinct claims*. Their joinder or severance is merely a matter of procedural convenience, and does not imply any substantive interdependence between the two." *Hanna v. Philadelphia Asbestos Co.*, 743 F.2d 996 (3d Cir. 1984) (emphasis added).

Here, the implant plaintiffs have sued DCC and the Nondebtor Codefendants jointly and severally. Thus, in each Implant Action, a single claim has been asserted against DCC and one or more of the Nondebtor Codefendants for damages arising from their alleged joint conduct. As a matter of law, where two or more parties are held jointly and severally liable for producing a single indivisible harm, the joint tortfeasors are substantively liable for all damages. 3 Fowler V. Harper et al., *The Law of Torts* § 10.1, at 7 (2d ed. 1986). Unlike the two claims in *Pacor*, which are "separate and distinct," the claims against DCC and the claims against the Nondebtor Codefendants arise out of the alleged joint conduct of multiple defendants which give rise to a single claim and are therefore substantively interdependent.

Because the implant plaintiffs challenge the combined actions of both DCC and the Nondebtor Codefendants, the resolution of such allegations necessarily involves a determination of the respective involvement of DCC and the Nondebtor Codefendants with respect to the conduct alleged.

Thus, the claims involved in the decision below are inextricably intertwined, unlike the claims in *Pacor*. Accordingly, the Sixth Circuit's decision does not conflict with the Third Circuit's decision, but, rather, follows it.[5]

Moreover, in *Pacor*, the potential impact on Manville's estate was minimal; there was no allegation that Manville's prospects for successfully reorganizing could have been affected by the plaintiff-supplier action. While *Pacor* involved only a single claim for indemnification or contribution, the decision below involved thousands of such claims. As the Sixth Circuit noted, "there is a qualitative difference between the single suit involved in *Pacor* and the overwhelming number of cases asserted against Dow Corning and the nondebtor defendants in this case." Tort Comm. Pet. App. 20a. Indeed, "[a] single possible claim for indemnification or contribution simply does not represent the same kind of threat to a debtor's reorganization plan as that posed by the thousands of potential indemnification claims at issue here." *Id.* at 20a-21a.

2. The *Fedpak* Decision

Petitioners also assert that the decision below "diverges" from the Seventh Circuit decision in *In re Fedpak Systems, Inc.*, 80 F.3d 207 (7th Cir. 1996). Tort Comm. Pet. 12. In that case, the district court determined that the debtor lacked standing to seek clarification of a bankruptcy court determination regarding the rights of various parties to a frozen dessert machine. The Seventh Circuit agreed that the debtor lacked standing, and further held that the debtor's request fell outside the scope of § 1334(b) because there was "only a remote connection between Fedpak's request for a clarifica-

---

[5] In addition to following *Pacor*, the decision below also relies explicitly on another decision of the Third Circuit, *In re Marcus Hook Dev. Park Inc.*, 943 F.2d 261 (3d Cir. 1991). Tort Comm. Pet. App. 15a. Thus, rather than conflicting with the Sixth Circuit decision, Third Circuit decisions appear to have been a major source for the Sixth Circuit's analysis in reaching the decision below.

tion order and the administration of the bankruptcy estate." *Id.* at 213 n.7. Because the frozen dessert machine was no longer part of the debtor's estate, the court concluded that the request for clarification of rights in that machine would not affect the amount of property for distribution or the allocation of property among creditors. *Id.* at 214.

Notably, in addition to the fact that *Fedpak* also involved only one claim, as opposed to the thousands of claims in DCC's bankruptcy case, under *Fedpak's* formulation of the test for related to jurisdiction, the result obtained by the Sixth Circuit below would have been exactly the same. That is, related to jurisdiction would exist because the Implant Claims against the Nondebtor Codefendants affect the amount of property for distribution and the allocation of property among creditors, as set forth *supra*.

3. Other Circuit Court Decisions

In addition to asserting that the decision below conflicts with *Pacor* and *Fedpak*, petitioners Breast Implant Tort Claimants Represented by O'Quinn, Kerensky, McAninch & Laminack (the "O'Quinn Plaintiffs"), incorrectly assert that the decision below conflicts with other decisions of the Seventh Circuit as well as decisions of the Second and Eleventh Circuits. In actuality, however, the decision below does not conflict with any of the other decisions cited by the O'Quinn Plaintiffs. Simply put, whether litigated in the Second, Third, Seventh, or Eleventh Circuits, the result obtained in the decision below would have been exactly the same under any of the purportedly "conflicting" tests applied in those Circuits.[6]

---

[6] For example, as demonstrated above, the Implant Claims against the Nondebtor Codefendants have a "significant connection" to DCC's bankruptcy, as required by the Second Circuit in *Turner v. Ermiger (In re Turner)*, 724 F.2d 338 (2d Cir. 1983). The result would also be the same under the test established in the Eleventh Circuit, which adopted the *Pacor* test for determining the existence of related to jurisdiction in *Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.)*, 910 F.2d 784 (11th

4. The *Celotex* Decision

In addition to being consistent with decisions of other circuit courts of appeals, the decision below is consistent with this Court's decision in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995). In *Celotex*, petitioner Celotex posted a supersedeas bond with an insurance company serving as surety in order to stay execution of a tort judgment rendered against it in the district court, pending appeal. Celotex's obligations under the bond were secured by its pledge of certain settlement proceeds. *Id.* at 1496. After the Fifth Circuit affirmed the judgment, Celotex filed for chapter 11 bankruptcy. *Id.* The bankruptcy court subsequently issued an injunction that prohibited judgment creditors from proceeding against sureties without bankruptcy court permission. When a judgment creditor nonetheless sought permission from another court to execute against the bond, permission was granted. *Id.* at 1497.

This Court held that the judgment creditor was bound by the bankruptcy court's injunction and rejected the argument that the bankruptcy court lacked jurisdiction to issue the injunction, citing *Pacor* with approval. Specifically, this Court stated:

> Congress did not delineate the scope of "related to" jurisdiction, but its choice of words suggests a grant of some breadth. . . . We agree with the views expressed in *Pacor* . . . that "Congress intended to grant comprehensive jurisdiction to the bankruptcy

---

Cir. 1990). In addition to interpreting § 1334(b) to "avoid the inefficiencies of piecemeal adjudication and promote judicial economy by aiding in the erficient and expeditious resolution of *all matters connected to the debtor's estate*," *id.* at 787 (emphasis added), the Eleventh Circuit concluded that an overlap between a debtor's affairs and another dispute is insufficient to confer § 1334(b) jurisdiction "unless its resolution also affects the bankrupt's estate or the allocation of assets among creditors." *Id.* at 789. As demonstrated above, the Implant Claims against the Nondebtor Codefendants significantly affect DCC's estate, satisfying the Eleventh Circuit's interpretation of *Pacor*.

> courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate," and that the "related to" language of § 1334(b) must be read to give district courts . . . jurisdiction over more than simple proceedings involving the property of the debtor or the estate. We also agree with that Court's observation that a bankruptcy court's "related to" jurisdiction cannot be limitless.

Id. at 1499 (quoting *Pacor*, 743 F.2d at 994). The Court explicitly recognized that proceedings "related to" a bankruptcy include "suits between third parties which have an effect on the bankruptcy estate," *id.* at 1498-99 n.5, and that the "jurisdiction of bankruptcy courts may extend more broadly in [a chapter 11 reorganization] case than in [a chapter 7 liquidation]." *Id.* at 1500.

Using the test established in *Pacor*, this Court determined that because the judgment creditor's immediate execution on the bond would, in turn, result in the insurer's efforts to foreclose on the collateral posted by Celotex, the judgment creditor's proceeding against the insurer "would have a direct and substantial adverse effect" upon Celotex's ability to reorganize, and therefore, was "related to" Celotex's bankruptcy:

> Admittedly, a proceeding by respondents against [the insurer] on the supersedeas bond does not directly involve Celotex, except to satisfy the judgment against it secured by the bond. But to induce [the insurer] to serve as surety on the bond, Celotex agreed to allow [the insurer] to retain the proceeds of a settlement resolving insurance coverage disputes between [the insurer] and Celotex. The Bankruptcy Court found that allowing respondents—and 227 other bonded judgment creditors—to execute immediately on the bonds would have a

> direct and substantial adverse effect on Celotex' ability to undergo a successful reorganization.

Id. The Court thus found that subject matter jurisdiction existed over a proceeding between nondebtors that would, in the future, directly affect the estate if the insurer (i) filed a motion for relief from the automatic stay imposed by § 362 of the Bankruptcy Code and (ii) commenced and won an action to foreclose on the collateral securing the bond.

Consistent with and explicitly citing and following this Court's decision in *Celotex*, the Sixth Circuit's decision below held that the resolution of the Implant Claims against the Nondebtor Codefendants would have a direct and substantial effect on DCC's ability to undergo a successful reorganization because the thousands of potential claims for indemnification and contribution could ripen into fixed claims, entitling DCC and the Nondebtor Codefendants to recover on their claims against each other.[7]

In order to complete its reorganization, DCC's liability for implant claims must be determined or estimated. Because the amount (if any) of DCC's liability for implant claims is, in part, a function of the Nondebtor Codefendants' share (if any) in the liability for the same plaintiffs' claims, a determination of DCC's liability cannot be made until the amount of damages (if any) awarded against the Nondebtor Codefendants, and DCC's allocable share thereof, are determined. The Sixth Circuit's holding that the Implant Claims against the Nondebtor Codefendants could conceivably have an effect on DCC's estate is thus completely consistent with this Court's decision in *Celotex*.

In short, petitioners' assertion that the decision below conflicts with *Celotex* and decisions of other circuit courts of

---

[7] The fact that the claim in *Celotex* was secured and the claims in the decision below are unsecured is a distinction without a difference. Both claims affected the administration of the respective debtor's estate.

appeals simply obscures petitioners' true contention, which is that the Sixth Circuit misapplied the well-settled rule of law regarding "related to" jurisdiction. As noted above, a petition for certiorari is rarely granted when the asserted error consists of the alleged misapplication of a properly stated rule of law.

5. No Misapplication of Law

In any event, petitioners' allegations of misapplication are without merit. Petitioners' theory that jurisdiction under 28 U.S.C. § 1334(b) cannot exist over the Implant Claims against the Nondebtor Codefendants is based on the erroneous premise that the resulting claims-over for indemnification or contribution are not claims at all, either because they have not been formally asserted or because they are contingent.

First, petitioners' representation that the Nondebtor Codefendants have not pursued claims for contribution is wrong. In addition to ignoring that the Nondebtor Codefendants may have claims for *indemnification* in addition to claims for contribution, petitioners ignore the fact that 3M has repeatedly asserted such claims throughout DCC's chapter 11 bankruptcy. In fact, the decision below recognized that 3M and the other Nondebtor Codefendants have "asserted repeatedly throughout their briefs, motions, and oral arguments that they intend to file claims for contribution and indemnification against Dow Corning, and we have no reason to doubt the veracity of those assertions at this time."[8] Tort Comm. Pet. App. 20a. Additionally, respondent is under no obligation to file a formal proof of claim form prior to the January 15, 1997 bar date established in DCC's bankruptcy case.[9]

---

[8] Upon information and belief, more than 10,000 such proofs of claim have already been filed in DCC's bankruptcy by one or more Nondebtor Codefendants based upon the Implant Actions.

[9] 3M's right to file a proof of claim is not affected in any way by the fact that claims-over were not previously asserted in the Implant Actions. The decision to wait to file such claims followed routine procedures, since a defendant that is sued as an alleged joint tortfeasor is not

Second, the contingent nature of a bankruptcy claim does not render that claim uncognizable. Petitioners' theory is completely contrary to the broad definition of a "claim" set forth in § 101(5) of the Bankruptcy Code, which explicitly includes contingent claims. *See* 11 U.S.C. § 101(5) (defining claim as a "right to payment, whether or not such right is reduced to judgment, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured").

Labeling a claim "contingent" does not mean it cannot have an impact on a debtor's estate. Implant Claims will result in fixed claims-over against DCC to the extent the Nondebtor Codefendants pay plaintiffs to satisfy a liability jointly held with DCC. Conversely, the potential claims-over of DCC against the Nondebtor Codefendants are valuable assets of DCC's estate, which are affected by the plaintiffs' suits against the Nondebtor Codefendants. Both types of claims-over—those asserted against DCC and those asserted by DCC—must be dealt with in some fashion under DCC's plan of reorganization. It necessarily follows, then, that the very real Implant Claims against the Nondebtor Codefendants will have a substantial effect on DCC's estate.

C. The Sixth Circuit Correctly Interpreted 28 U.S.C. § 157(b)(5)

The argument that the Sixth Circuit misinterpreted 28 U.S.C. § 157(b)(5) is equally without merit, and does not provide an alternative basis for the Court to grant the writ.

---

required to assert a claim for contribution against a codefendant in the same action. *See* 18 Am. Jur. 2d *Contribution* § 9 (1985) ("the right to sue [for contribution] arises when a party has paid the whole of the obligation or more than his share thereof. In either event the right to contribution is merely contingent until payment or its equivalent is made, and not until then does it become complete"); Uniform Contribution Among Tortfeasors Act § 1(b), 12 U.L.A. 194 (1996) ("The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability . . . .").

A necessary condition to implementing the reorganization policy underlying the bankruptcy laws is the centralization in one forum, to the maximum extent permitted by the United States Constitution, of all the debtor's assets, as well as a process for dealing with all the debtor's liabilities.[10] Consistent with congressional intent and the words of the Bankruptcy Code, the Sixth Circuit properly construed § 157(b)(5) to permit centralization of claims against nondebtors in cases where the failure to centralize would harm the debtor's prospects of reorganization. *See A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994, 1011 (4th Cir. 1985) (congressional purpose of § 157(b)(5) was to "centralize the administration of the estate and to eliminate the 'multiplicity of forums for the adjudication of parts of a bankruptcy case' ") (quoting 130 Cong. Rec. H7492 (daily ed. June 29, 1984) (statement of Rep. Kastenmeier)), *cert. denied*, 479 U.S. 876 (1986).

Petitioners' argument is based on the erroneous premise that § 157(b)(5) can never authorize the transfer of claims against nondebtors. Because the language of the statute, the legislative history, and the case law do not support this assertion, however, petitioners do not, indeed cannot, cite any authority to support their proposition.

Section 157(b)(5) applies to "personal injury tort and wrongful death claims." It does not contain *any* limitations. Petitioners' argument that Congress must have meant personal injury or wrongful death claims against the estate because a different section (§ 157(b)(2)(B)) does refer to claims against the estate, is completely without merit.[11]

---

[10] Congress has provided the bankruptcy courts with powerful tools in order to accomplish these goals: *see, e.g.*, 28 U.S.C. § 1334(e) (exclusive jurisdiction of district court over all debtor's property wherever located); 11 U.S.C. § 541(a) (creation of estate comprised of property wherever located); 11 U.S.C. § 105(a) (nationwide service of process).

[11] Additionally, the warning that respondents' interpretation of § 157(b)(5) would conflict with the MDL proceedings is factually erro-

As discussed *supra*, this Court has held that 28 U.S.C. § 1334(b) applies not only to actions against debtors, but also to actions against nondebtors. *See Celotex Corp. v. Edwards*, 115 S. Ct. 1493, 1498-99 n.5 (1995) (proceedings "related to" bankruptcy include "suits between third parties which have an effect on the bankruptcy estate"). It follows, then, that other provisions of title 28 of the United States Code which are related to § 1334(b) should be interpreted in a consistent manner with that section. As this Court has stated, statutory construction is

> a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 369 (1988).

Moreover, the Implant Claims against the Nondebtor Codefendants are, in effect, claims against DCC. As discussed *supra*, the claims against DCC are inextricably intertwined with the claims against respondent and the other Nondebtor Codefendants because plaintiffs have sued DCC and the Nondebtor Codefendants jointly and severally. *Cf. American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 14 (1951) ("where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action"). As the decision

---

neous. The District Court's jurisdiction to transfer claims for *trial purposes* is entirely compatible with the limited jurisdiction that is being exercised by the Multidistrict Court which, as pointed out by petitioner, coordinates *pretrial proceedings*. Tort Comm. Pet. 7. Moreover, the Multidistrict Court has no jurisdiction over state court implant claims that are the subject of the decision below. Accordingly, the statement that the centralization of the Implant Claims will disrupt the MDL system is in error.

below held, the nature of the Implant Claims establishes that DCC and the Nondebtor Codefendants are "closely related" with respect to the implant litigation. *See also Robins*, 788 F.2d at 999 (the unusual situation permitting § 362 to apply to nondebtors is the existence of "such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor").

The Sixth Circuit's conclusion that § 157(b)(5) applies to claims against debtors as well as nondebtors is directly supported by the only circuit court of appeals decision directly on point—the *Robins* decision. Prior to the filing of its chapter 11 case, Robins was faced with 5,000 Dalkon Shield actions filed in state and federal courts throughout the United States. *Id.* at 996. Over half of such actions named the debtor as the sole defendant, while the remainder named as defendants both debtor and nondebtor parties, including the debtor's insurance company, hospitals, and physicians. The district judge granted the debtor's motion pursuant to § 157(b)(5) to transfer all 5,000 actions, including those against nondebtor defendants, to the district court in which the bankruptcy case was pending. The scope of the order was very clear and explicitly transferred claims against nondebtor codefendants:

> ORDERED, pursuant to Sections 157(b)(5) and 1334(b) of Title 28 of the United States Code, that to the extent personal injury tort or wrongful death actions against Robins *or any other defendant* that are related to the Robins Chapter 11 case are to be tried in a district court, such action shall be tried in the Richmond Division of the United States District Court for the Eastern District of Virginia; and it is further
>
> ORDERED, pursuant to Section 1334(b) of Title 28 of the United States Code, that *all actions based*

> *upon personal injury tort or wrongful death claims* arising from the use of the Dalkon Shield intrauterine contraceptive device are proceedings related to this Chapter 11 case over which this Court has jurisdiction; and it is further
>
> ORDERED that *all actions* related to the Robins Chapter 11 case, as determined by this Order, now pending in any federal district court or subsequently removed to any federal district court during the pendency of this Chapter 11 case, be transferred by the Clerks of those Courts to this Court . . . .

In re A.H. Robins Co., No. 85-01307-R (E.D. Va. Nov. 9, 1985) (emphasis added).

On appeal, the Fourth Circuit confirmed the consolidation in the district court of all Dalkon Shield claims commenced against both the debtor and nondebtors:

> [T]here are very real considerations that support a centralization of *all* the Dalkon Shield claims, at least at first, in the district court having jurisdiction of the bankruptcy. The "single focal point" of this proceeding is the development of a reasonable plan of reorganization for the debtor, one which will work a rehabilitation of the debtor and at the same time assure fair and non-preferential resolution of the Dalkon Shield claims.

Robins, 788 F.2d at 1011 (emphasis added). *See also Murray v. Pan Am. World Airways, Inc. (In re Pan Am Corp.)*, 16 F.3d 513 (2d Cir. 1994) (§ 157(b)(5) applied to transfer of wrongful death lawsuits naming two Pan Am debtors and one nondebtor Pan Am affiliate).

Petitioners argue that the *Robins* decision should be ignored because no transfer of claims actually occurred. What petitioners fail to state, however, is that after the Fourth Circuit concluded that centralization would be the rule, the parties

reached a settlement in connection with a plan of reorganization. *See In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.) (approving settlement), *cert. denied*, 493 U.S. 959 (1989). The fact that the physical transfer of claims under § 157(b)(5) was rendered unnecessary as a result of the settlement has absolutely no bearing on the correctness or ultimate efficacy of the Fourth Circuit's decision. Indeed, because the decision below is entirely consistent with the Fourth Circuit's decision in *Robins*, petitioners have failed to demonstrate the existence of a circuit split regarding the interpretation of § 157(b)(5), which is a further reason for the Court to deny the Petitions.

Accordingly, because the decision below interpreted 28 U.S.C. §§ 1334(b) and 157(b)(5) correctly, does not conflict with the decision of any other court of appeals, and is consistent with this Court's decision in *Celotex*, the Court should deny petitioners' request for a writ of certiorari.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be denied.

Respectfully submitted,

Bruce R. Zirinsky
Counsel of Record

Greg A. Danilow
Howard B. Comet
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Counsel for Respondent,
Minnesota Mining and
Manufacturing Company

November 27, 1996

RESPONDENT'S APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 95-CV-72397-DT

In Re:

DOW CORNING CORPORATION,

Debtor.

HON. DENISE PAGE HOOD

MEMORANDUM OPINION AND ORDER ON REMAND REGARDING SECTION 1334(C) ABSTENTION

I. *INTRODUCTION*:

This matter is before the Court on remand from the United States Court of Appeals for the Sixth Circuit. *In re: Dow Corning Corporation*, Nos. 95-2034/2082/2084/2106/2107, 86 F.3d 482 (6th Cir. 1996) (Amended). This Court previously entered an order finding that it did not have subject matter jurisdiction over the tort claims against the nondebtor defendants pursuant to 28 U.S.C. § 157(b)(5). The Sixth Circuit reversed this Court's determination on this issue and found that this Court had subject matter jurisdiction over the tort claims pending against the nondebtor defendants pursuant to 28 U.S.C. § 157(b)(5). The Sixth Circuit remanded this case on the issue of whether or not this Court should abstain from the tort claims against the nondebtors pursuant to 28 U.S.C. § 1334(c)(1) and/or (2).

II. *ANALYSIS*:

A. *Whether this Court must abstain or, alternatively, exercise its discretion to abstain pursuant to 28 U.S.C. § 1334(c).*

1. *Mandatory Abstention.*

The Sixth Circuit has concluded that this Court has "related to" jurisdiction pursuant to 28 U.S.C. § 1334(b) over the actions pending against the nondebtors Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter, and Bristol-Myers Squibb in nonbankruptcy forums nationwide. *In re Dow Corning Corp., supra* at 494. In a section 157(b)(5) motion, an abstention analysis is required. *In re Pan American Corp.*, 950 F.2d, 839, 844 (2nd Cir. 1991); *In re Dow Corning Corp., supra* at 497. The Tort Claimants' briefs and other claimants' objections and responses to the nondebtors' motions under Section 157(b)(5) requested this Court to abstain under 28 U.S.C. § 1334(c).

Section 1334(c) qualifies Section 1334(b)'s broad grant of jurisdiction. *In re Dow Corning Corp.* at 497. There are two types of abstention under Section 1334(c): discretionary abstention under 28 U.S.C. § 1334(c)(1) and mandatory abstention under 28 U.S.C. § 1334(c)(2). *Id.* Mandatary abstention will be addressed first.

In order for mandatory abstention to apply, a proceeding must: 1) be based on a state law claim or cause of action; 2) lack a federal jurisdictional basis absent the bankruptcy; 3) be commenced in a state forum of appropriate jurisdiction; 4) be capable of timely adjudication; and 5) be a non-core proceeding. *Id.*

As to the first factor, the claims and causes of action at issue against the nondebtors are personal injury tort claims which are essentially state law claims. Addressing the second factor, this Court notes that the Sixth Circuit held that this Court has "related to" bankruptcy jurisdiction over the nondebtors. The personal injury tort actions against the nondebtors are not proceedings which need a determination under

the bankruptcy laws and do not arise in a bankruptcy case. Absent the bankruptcy of the debtor in this matter, this Court would lack federal jurisdiction over the actions against the nondebtors.[1] With respect to the third factor, there have been no allegations that the actions against the nondebtors have not been commenced in a state forum of appropriate jurisdiction. Satisfying the fourth factor, the parties have informed the Court that there are numerous cases ready for trial against the nondebtors. Furthermore, the Honorable Sam C. Pointer, Jr. in his March 19, 1996 (Order 29) and April 16, 1996 (Order 29B) orders and the Multidistrict Litigation Panel's April 10, 1996 Conditional Remand Order, indicate there are numerous cases against the nondebtors which are indeed ready for trial.

Considering the fifth factor, the Court must determine whether the actions against the nondebtors are non-core proceedings. There are two categories of core proceedings: proceedings "arising under" title 11 and proceedings "arising in" title 11. *In re Harris Pine Mills*, 44 F.3d 1431, 1435 (9th Cir. 1995), *cert. denied*, 115 S.Ct. 2555 (1995). Proceedings "arising under" title 11 "involve a cause of action created or determined by a statutory provision of title 11." *Id.* Proceedings "arising in" title 11 are a reference to those "administrative" matters that arise only in bankruptcy cases and are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy. *Id.* Section 157(b)(2) provides a nonexclusive list of proceedings

---

[1] The only cases against the nondebtors over which this Court would have jurisdiction, sitting in the Eastern District of Michigan, are those cases that involve complete diversity. The Court notes that most of the cases involving the nondebtors also include the Debtor Dow Corning Corporation which would defeat this Court's diversity jurisdiction. (*See* the Court's Discretionary Abstention analysis, *infra*.) The Court notes that mandatory abstention also apply to removed cases. *William v. Shell Oil Co.*, 169 B.R. 684, 690-691 (S.D. Cal. 1994). The Court further notes that absent the bankruptcy, the Court has no jurisdiction over the cases against the nondebtors where the claims arose outside of the Eastern District of Michigan.

which are core proceedings. Non-core proceedings are only "related to" a case under title 11. *Id.* at 1435. A non-core proceeding "does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy." *Id.*

Personal injury tort or wrongful death claims are excluded from the catalog of core proceedings by 28 U.S.C. § 157(b)(2)(B) and (O) which state in pertinent part:

> (b)(2) Core proceedings include, but are not limited to—
>
> * * *
>
> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 *but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11*;
>
> * * *
>
> (O) other proceedings affecting the liquidation of assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, *except personal injury tort or wrongful death claims*.

28 U.S.C. § 157(b)(2)(B) and (O) (emphasis added). *In re Hughes*, 98 B.R. 115, 118 (D.C. 1988). The actions against the nondebtor defendants are non-core proceedings under 28 U.S.C. § 157.

Section 157(b)(4) provides that "[n]on-core proceedings under § 157(b)(2)(B) of title 28 [liquidation of personal injury tort or wrongful death cases], shall *not* be subject to the mandatory abstention provisions of Section 1334(c)(2)." *In re Pan Am*, 950 F.2d at 845; 28 U.S.C. § 157(b)(4). As indicated above, the non-core proceedings included in Section

157(b)(2)(B) are "liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims *against the estate* for purposes of distribution in a case under title 11." (Emphasis added). Here, the personal injury and/or wrongful death tort actions are *not* "against the estate" of the debtor but against the nondebtors. Consequently, the non-core proceedings and actions against the nondebtors are *not* exempt from mandatory abstention under Section 157(b)(4). Moreover, 28 U.S.C. § 1334(c)(2) provides for mandatory abstention in cases involving state law claims for which the sole basis of bankruptcy jurisdiction is "related to" jurisdiction. *Celotex Corp. v. Edwards*, 115 S.Ct. 1493, 1506, note 10 (1995) (Stevens, J., dissenting). In the instant case, the Sixth Circuit held that this Court had Section 1334(b) or "related to" jurisdiction over the actions pending against the nondebtors in nonbankruptcy forums nationwide. *In re Dow Corning*, *supra* at 494. Based on the above, the Court finds that the four factors calling for mandatory exemption under Section 1334(c)(2) have been met.

2. *Discretionary Abstention.*

Alternatively, the Court exercises its discretion to remand pursuant to 28 U.S.C. § 1334(c)(1). Section 1334(c)(1) provides:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

In *In re White Motor Credit*, 761 F.2d 270 (1985), the Sixth Circuit noted:

> ... federal courts should be hesitant to exercise jurisdiction when state issues substantially predominate, whether in terms of proof, of the scope of

> the issues raised, or of the comprehensiveness of the remedy sought.

Id. at 274 (quotations omitted). Here, the personal injury/tort claims against the nondebtors are predominantly state law claims. The proof and scope of issues in dispute and the comprehensiveness of the remedies sought varies state to state. The Sixth Circuit in *In re White Motor* further noted that:

> ... in large bankruptcy cases with hundreds or even thousands of tort litigants beating on the door of one federal judge, ... at least judicial economy and expeditiousness, may depend on the court's authority to refer cases to other courts. Since the 1984 Bankruptcy Act prevents reference of these tort cases to bankruptcy courts, as in the past, it makes good sense to give the district courts wide latitude in referring the cases through abstention to other courts.

Id. The Court finds that discretionary abstention from the cases against the nondebtors would best serve the interest of justice and comity. Waiting until the estimation and confirmation of a plan of reorganization before the actions against the nondebtors are liquidated would not result in a more precise estimation of the assets needed by the debtor's estate to cover any indemnification and contribution claims against the debtor's estate. The estimation of any possible indemnification and contribution claims by the nondebtors against the debtor's bankruptcy estate would not be any different than if the cases against the nondebtors proceed to trial at this stage. To the contrary, as the various trials proceed against the nondebtors, a clearer picture would emerge as to whether the nondebtors would have any indemnification or contribution claims against the debtor's estate.

The Sixth Circuit opinion addresses the Joint Insurance issue between Dow Corning, Dow Chemical and Corning Incorporated finding that the Court had "related to" jurisdiction based on the Joint Insurance between the parties. The

Sixth Circuit opinion does not address the Joint Insurance issue as it pertains to the abstention issue. This Court addresses this issue as it relates to the interest of justice and comity issues which must be addressed in an analysis of discretionary abstention. Although Dow Chemical has apparently notified insurers that it is asserting claims against the jointly-held policies, it has been argued that as to Dow Chemical, the joint policies are in fact excess policies and that Dow Chemical has sufficient primary insurance. (Ex. A, p. 5, Official Committee of Tort Claimants' Brief, filed June 7, 1996). The Sixth Circuit's opinion addresses the insurance issue from the point of view of whether the Debtor's estate will have sufficient resources. The Debtor itself has not put forth proof that its estate would be dissipated based upon the "threat" posed to those insurance policies by Dow Chemical and Corning Incorporated. In *The Matter of Zale Corp.*, 62 F.3d 746 (5th Cir. 1995), the Fifth Circuit found that even if the bankruptcy court had "related to" jurisdiction over certain insurance policies with indemnification contracts, a nondebtor should not be shielded by the powers of the bankruptcy court. *Id.* at 760-761. The Bankruptcy Code discharges the Debtor's liabilities and not those owed by third parties. *Id.* at 760, notes 42, 43, and 44; 11 U.S.C. § 524(e). If the Court does not abstain from the tort claims against the nondebtors, the tort claims against the nondebtors would effectively be determined by this Court which would be contrary to 11 U.S.C. § 524(e). Section 524(e) does not allow the Bankruptcy Code to be used to discharge the debts of nondebtors. *Id.*, at 760, notes 42, 43, and 44. The Court finds that the "threat" posed to the insurance policies by the nondebtors does not overcome factors in favor of discretionary abstention. Specifically, the Court finds the interests of justice and comity weigh in favor of discretionary abstention.

III. *CONCLUSION*:

This Court finds that the cases against the nondebtors are subject to mandatory abstention under 28 U.S.C. § 1334(c)(2). Alternatively, the Court finds that in the interest of justice, comity and judicial economy, it will exercise its discretion to abstain from the cases against the nondebtors under 28 U.S.C. § 1334(c)(1).

Accordingly,

IT IS ORDERED that the actions against the nondebtor defendants are subject to mandatory abstention under 28 U.S.C. § 1334(c)(2); alternatively,

IT IS ORDERED that the Court will exercise its discretion to ABSTAIN from the cases against the nondebtors under 28 U.S.C. § 1334(c)(1).

/s/ DENISE PAGE HOOD
DENISE PAGE HOOD
United States District Judge

DATED: JUL 30 1996

Nos. 96-330 & 96-742

Supreme Court, U.S.
FILED
NOV 27 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

OFFICIAL COMMITTEE OF TORT CLAIMANTS, *Petitioner*,

—v.—

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, CORNING INCORPORATED, BAXTER INTERNATIONAL INCORPORATED, MINNESOTA MINING AND MANUFACTURING COMPANY, BRISTOL-MYERS SQUIBB COMPANY AND MEDICAL ENGINEERING CORPORATION, *Respondents*.

BREAST IMPLANT TORT CLAIMANTS REPRESENTED BY O'QUINN, KERENSKY, MCANINCH & LAMINACK, *Petitioners*,

—v.—

DOW CORNING CORPORATION, *et al.*, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS BRISTOL-MYERS SQUIBB COMPANY AND MEDICAL ENGINEERING CORPORATION

Hayden Smith
Counsel of Record
David J. Adler
MCCARTER & ENGLISH
Gateway Four
100 Mulberry Street
Newark, New Jersey 07102
(201) 622-4444
Counsel for Respondents
Bristol-Myers Squibb Company and
Medical Engineering Corporation

35 pp

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the decision of the United States Sixth Circuit Court of Appeals in *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3167 (U.S. Aug. 28, 1996) (No. 96-330) is reviewable by this Court in light of the present procedural posture of the case?

2. Whether the decision of the United States Sixth Circuit Court of Appeals in *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3167 (U.S. Aug. 28, 1996) (No. 96-330) conflicts with the decisions of other Courts of Appeals regarding the scope of "related to" jurisdiction under 28 U.S.C. § 1334(b)?

RULE 29.6 LISTING

Pursuant to Supreme Court Rule 29.6, Respondent Bristol-Myers Squibb Company states that it does not have a parent company. The subsidiaries (other than wholly owned subsidiaries) of Bristol Myers Squibb Company are:

Bristol-Myers Lion Ltd.
Bristol-Myers Squibb G.M.B.H.
Mead Johnson (Guangzhou) Ltd.
P.T. Squibb Indonesia
Synbiotics Limited
Laboratories UPSA SAS
RCS Realty Corporation
Sino American Shanghai Squibb Pharma Ltd.
Squibb Nigeria Limited
2309 Realty Corporation

Respondent Medical Engineering Corporation states that it is a wholly owned subsidiary of Bristol-Myers Squibb Company. Medical Engineering Corporation does not have any subsidiaries (other than wholly owned subsidiaries).

TABLE OF CONTENTS

	PAGE
Counter-Statement of Questions Presented	i
Rule 29.6 Listing	ii
Table of Contents	iii
Table of Authorities	iv
Counter-Statement of the Case	1
Reasons for Denying the Writ	6
Conclusion	16
Appendices:	
Appendix A: Opinion of the District Court (July 30, 1996)	1a
Appendix B: Order of the Sixth Circuit (September 24, 1996)	9a

TABLE OF AUTHORITIES

Cases	PAGE
A.H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986)	7, 11
Aetna Life Insurance Co. v. Haworth, 300 U.S. 227 (1937)	7
American Construction Co. v. Jacksonville, Tampa & Key West Railway Co., 148 U.S. 372 (1893)	8
Anderson v. Green, ___ U.S. ___, 115 S. Ct. 1059 (1995)	9
Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R. Co., 389 U.S. 327 (1967)	8
Celotex Corp. v. Edwards, ___ U.S. ___, 115 S. Ct. 1493 (1995)	12
City Communications, Inc. v. City of Detroit, 888 F.2d 1081 (6th Cir. 1989)	9
Dames & Moore v. Regan, 453 U.S. 654 (1981)	9
Defunis v. Odegaard, 416 U.S. 312 (1974)	10
In re Dogpatch U.S.A., Inc., 810 F.2d 782 (8th Cir. 1987)	13
In re Dow Corning Corp, 187 B.R. 919 (E.D. Mich. 1995)	4
In re Dow Corning Corp., 187 B.R. 934 (E.D. Mich. 1995)	4
Dunn v. Blumstein, 405 U.S. 330 (1972)	10
In re Fedpak Systems, Inc., 80 F.3d 207 (7th Cir. 1996)	11, 15, 16

PAGE

In re Fietz, 852 F.2d 455 (9th Cir. 1988) 13

In re G.S.F. Corp., 938 F.2d 1467 (1st Cir. 1991) 13

In re Gardner, 913 F.2d 1515 (10th Cir. 1990) 13

Hamilton Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251 (1916) 8

Hayburn's Case, 2 Dall. 409 (1792) 10

Iron Arrow Honor Society v. Heckler, 464 U.S. 67 (1983) 10

Kelly v. Nodine (In re Salem Mortgage Co.), 783 F.2d 626 (6th Cir. 1986)..... 5

In re Lemco Gypsum, Inc., 910 F.2d 784 (11th Cir. 1990) 13

Lewis v. Continental Bank Corp., 494 U.S. 472 (1990) 10

Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning Corp.), 86 F.3d 482 (6th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3167 (U.S. Aug. 28, 1996).....*passim*

Liner v. Jafco, Inc., 375 U.S. 301 (1964)..... 10

Marbury v. Madison, 5 U.S. 137 (1803) 6

In re Marcus Hook Development Park, Inc., 943 F.2d 261 (3d Cir. 1991) 14

Metzenbaum v. FERC, 675 F.2d 1282 (D.C. Cir. 1982) 9

Muskrat v. United States, 219 U.S. 346 (1911)..... 10

Pacor, Inc. v. Higgins, 743 F.2d 984 (1984) .....*passim*

PAGE

Powell v. McCormack, 395 U.S. 486 (1969) 9

Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 9

Rice v. Sioux City Cemetery, Inc., 349 U.S. 70 (1955) 7

Robinson v. Michigan Consolidated Gas Co., 918 F.2d 579 (6th Cir. 1990) 13

Roe v. Wade, 410 U.S. 113 (1973) 10

In re Silicone Gel Breast Implants Products Liability Litig., MDL No. 926, 793 F. Supp. 1098 (J.P.M.L. 1992) 2

Sosna v. Iowa, 419 U.S. 393 (1975) 10

Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911) 10

St. Pierre v. U.S., 319 U.S. 41 (1943) 9-10

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) 14

Super Tire Engineering Corp. v. McCorkle, 416 U.S. 115 (1974) 10

In re Turner, 724 F.2d 338 (2d Cir. 1983) 15

United States v. Munsingwear, Inc., 340 U.S. 36 (1950) 10

United States v. Richardson, 418 U.S. 166 (1974) 6

Virginia Military Institute v. United States, 508 U.S. 946 (1993) 8

Weinstein v. Bradford, 423 U.S. 147 (1975) 10

In re Wood, 825 F.2d 90 (5th Cir. 1987) 13

PAGE

Statutes

28 U.S.C. § 157(b)(5) ..... *passim*

28 U.S.C. § 1334(b) 4, 12, 13

28 U.S.C. § 1334(c) 5

28 U.S.C. § 1367(a) 4

28 U.S.C. § 1452(a) 3

Other Authorities

Marcia Angell, *Science on Trial: The Clash of Medical Evidence and the Law in the Breast Implant Case*, (W.W. Norton & Co. 1996)..... 1

C. Wright, A. Miller, & E. Cooper, 13 Federal Practice and Procedure, § 3532 (1975)..... 9

COUNTER-STATEMENT OF THE CASE

Respondents Bristol-Myers Squibb Company ("BMS") and Medical Engineering Corporation ("MEC"; collectively, "Respondents") respectfully pray that the petitions of the Official Committee of Tort Claimants (the "Tort Committee") and the breast implant claimants represented by O'Quinn, Kerensky, McAninch & Laminack (the "O'Quinn Claimants"; collectively, the "Petitioners") for writs of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3167 (U.S. Aug. 28, 1996) (No. 96-330) be denied.

A. Breast Implants and the Bankruptcy of Dow Corning

Petitioners' requests for certiorari arise from the chapter 11 bankruptcy proceedings of Dow Corning Corporation ("Dow Corning" or the "Debtor") pending in the United States Bankruptcy Court for the Eastern District of Michigan, Northern Division (the "Bankruptcy Court"). Dow Corning, a financially healthy company, was driven into bankruptcy by an avalanche of actions brought against it for injuries allegedly sustained by recipients of silicone-gel breast implants.[1]

---

[1] As of May 15, 1995, the date on which it filed for bankruptcy, Dow Corning had been named as a defendant in more than seven thousand suits. Despite the avalanche of suits, and in contrast to the assertions made by the Tort Committee on page 5 of its Petition, there has never been any reliable scientific evidence to support the claim that silicone-gel breast implants cause autoimmune or other systemic disease. *See generally* Marcia Angell, *Science on Trial: The Clash of Medical Evidence and the Law in the Breast Implant Case*, (W.W. Norton & Co. 1996).

Like Dow Corning, Respondents and others[2] are named as defendants in thousands of suits seeking damages for injuries allegedly caused by silicone-gel breast implants. In many of these suits, Dow Corning is named as a party defendant with Respondents because: (i) it supplied silicone gel (or other silicone components) to the Respondents; or (ii) the actions involve implants manufactured by both MEC[3] (or one of its predecessors) and Dow Corning. Additionally, in the vast majority of these actions, the plaintiffs assert that Dow Corning and Respondents are joint tortfeasors.

B. Consolidation and the Global Settlement

Due to the rapidly growing number of breast implant suits being commenced in federal courts, the Judicial Panel on Multidistrict Litigation (the "MDL"), on June 25, 1992, ordered the transfer of all breast-implant actions pending in the federal courts to the Honorable Sam C. Pointer, Jr., Chief Judge, United States District Court for the Northern Division of Alabama (Southern Division) for the coordination of pretrial proceedings. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL No. 926, 793 F. Supp. 1098, 1100 (J.P.M.L. 1992). In transferring these actions, the MDL determined that consolidation of all federal implant actions would avoid duplication of discovery, prevent inconsistent pretrial rulings and conserve the parties' resources. *Id.*

---

[2] Baxter International Incorporated, Baxter Healthcare Corporation (collectively, "Baxter"), Minnesota Mining and Manufacturing Company ("3M"), and Dow Corning's parent corporations, The Dow Chemical Company and Corning, Inc. (together, the "Shareholders"). Collectively, Respondents, Baxter, 3M and the Shareholders are referred to herein as the "Non-Debtors."

[3] BMS never designed, manufactured, marketed or sold any silicone gel breast implants or any material or components for such implants. Rather, since 1982 it has owned all of the shares of MEC, which manufactured, sold and distributed breast implants from 1969 to 1991.

By Order dated April 1, 1994, Judge Pointer preliminarily certified one class action for settlement purposes. On September 1, 1994, Judge Pointer approved a complex settlement agreement (the "Global Settlement") between members of the Settlement Class and certain defendants that contemplated the creation of a $4.25 billion settlement fund. Approximately 440,000 claimants registered as potential participants in the Global Settlement. Because of: (i) the large number of opt outs; (ii) the large number of claims against the settlement fund; and (iii) the bankruptcy of Dow Corning, a revised settlement program, which did not include Dow Corning, was approved by Judge Pointer by Order dated December 22, 1995 (the "Revised Settlement Program"). Several appeals have been taken from the Revised Settlement Program, which are presently pending in the Eleventh Circuit.

Pursuant to the Revised Settlement Program, 3M, Baxter, and Respondents will pay benefits to breast implant recipients which are assured and not subject to further reduction. Breast implant recipients are presently electing whether to accept the Revised Settlement Program, which provides for extended opt-out periods.

C. Removal of State Court Cases and The Transfer Motion

On June 5, 1995, following Dow Corning's filing for bankruptcy, Respondents along with the Debtor, Baxter and 3M began removing pending state court cases in which one or more plaintiffs in each suit had opted out of the Global Settlement and in which Dow Corning was a party (the "Opt-Out Actions") pursuant to 28 U.S.C. § 1452(a). Thereafter, on June 14, 1995, Respondents filed a motion in the United States District Court for the Eastern District of Michigan, Southern Division (the "District Court") seeking, *inter alia*, that the Court transfer the Opt-Out Actions to the District Court pursuant to 28 U.S.C. § 157(b)(5) (the "Transfer

Motion"). The Debtor, Baxter and 3M also filed similar motions.

On July 31, 1995, the District Court heard oral argument on the Transfer Motion. By Order and Opinion dated September 12, 1995 (the "September 12th Order"), the District Court denied the Transfer Motion. *See In re Dow Corning Corp.*, 187 B.R. 934 (E.D. Mich. 1995).[4] The District Court denied the Transfer Motion because it determined that no federal jurisdictional existed, under either "related to" jurisdiction pursuant to 28 U.S.C. § 1334(b) or supplemental jurisdiction under 28 U.S.C. § 1367(a).

D. Reversal by the Sixth Circuit

Respondents appealed from the September 12th Order. On April 9, 1996, the United States Court of Appeals for the Sixth Circuit (the "Sixth Circuit") issued an opinion and order reversing the September 12th Order. 81 F.3d 635 (6th Cir. 1996). That opinion and order was subsequently withdrawn and on June 3, 1996, the Sixth Circuit issued an amended opinion and its mandate. *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3167 (U.S. Aug. 28, 1996) (No. 96-330) ("*Lindsey*"). In *Lindsey*, the Sixth Circuit determined, *inter alia*, that the claims pending against Non-Debtors were "related to" the Debtor's bankruptcy under 28 U.S.C. § 1334(b).[5] In reversing the September 12th Order, the Sixth Circuit remanded the matter to the District Court to determine

---

[4] In a companion opinion, *In re Dow Corning Corp*, 187 B.R. 919 (E.D. Mich. 1995), the District Court refused to transfer the Opt-Out Actions pending against the Shareholders.

[5] Because the Sixth Circuit determined that "related to" jurisdiction existed, it did not address whether the District Court erred in determining that supplemental jurisdiction did not exist under 28 U.S.C. § 1367(a).

whether the Opt-Out Actions should be transferred to the District Court in accordance with 28 U.S.C. § 157(b)(5). *Id.* at 498. In connection with that determination, the Sixth Circuit noted that the District Court would be required to conduct an abstention analysis:

> to "determine in each individual case whether hearing it would promote or impair efficient and fair adjudication of the bankruptcy cases."

Id. at 497 (quoting *Kelley v. Nodine* (*In re Salem Mortgage Co.*), 783 F.2d 626, 635 (6th Cir. 1986)).

E. Abstention Order and Further Proceedings

Although barely referenced by Petitioners,[6] following *Lindsey*, the District Court, on July 30, 1996, entered an order (the "Abstention Order") abstaining *en masse* under 28 U.S.C. § 1334(c) from transferring the Opt-Out Actions.[7] The Abstention Order is reprinted at 1a-8a. Thereafter, on August 13, 1996, each of the Respondents filed a notice of appeal with the District Court. On August 23, 1996, the Tort Committee filed a motion (the "Dismissal Motion") to dismiss the appeals. Respondents served their opposition papers on September 3, 1996.

On September 24, 1996, the Sixth Circuit entered an order directing that the Dismissal Motion be addressed in connection with the merits of the appeal. The Sixth Circuit order is reprinted at 9a-10a. The Sixth Circuit also expedited the

---

[6] It is not until page 11 of its Petition that the Tort Committee notes: "[I]t happens that in this case, following the reversal and remand, the district court concluded that it should abstain . . ." Tort Committee Pet. at 11. The O'Quinn Claimants relegate this important fact to a footnote. O'Quinn Claimants Pet. 2-3 n.2.

[7] The Tort Committee filed its petition for certiorari on August 27, 1996,—a month after the District Court entered the Abstention Order. The O'Quinn Claimants served their original petition on August 29, 1996 and filed a corrected petition on November 12, 1996.

briefing schedule. As of November 19, 1996, the appeal has been fully briefed. Respondents have not been notified of the date for oral argument.

REASONS FOR DENYING THE WRIT

The *Lindsey* decision presents no important or novel legal question which would justify the issuance of a writ of certiorari. Initially, due to the District Court's decision to abstain, the issues sought to be reviewed are not presently justiciable. Because the Abstention Order has not yet been reversed by the Sixth Circuit, Petitioners seek review of issues that are at best not yet ripe for determination. At worst, assuming the Sixth Circuit does not reverse the Abstention Order, the petitions seek review of moot issues and the issuance of an advisory opinion from the Court. In any event, certiorari is not warranted at this time.

Moreover, contrary to Petitioners' assertions, the *Lindsey* decision neither conflicts with decisions of other Courts of Appeals nor represents "an unprecedented expansion of bankruptcy jurisdiction." Tort Committee Pet. at 4. The asserted "conflicts" are not genuine and simply reflect applications of the same or similar legal principles to different factual situations.

I.

Certiorari Should Be Denied Because There Are No Justiciable Issues Before the Court

Since *Marbury v. Madison*, 5 U.S. 137 (1803), the Court has recognized that judicial power of the federal courts is limited to "cases or controversies" under Article III of the Constitution. A "case or controversy" must be justiciable and not be moot, a political question or a request for an advisory opinion. *See United States v. Richardson*, 418 U.S. 166, 171 (1974). (citations omitted).

As Chief Justice Hughes explained in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937),

> A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

As demonstrated herein, while the issues raised by Petitioners may be intellectually stimulating, there are no justiciable issues to be determined in light of the Abstention Order. Whether these issues will ultimately become justiciable is wholly dependent upon the present appeal pending before the Sixth Circuit.[8] Regardless of the Sixth Circuit's ultimate determination, certiorari should be denied at this time. *Rice v. Sioux City Cemetery, Inc.*, 349 U.S. 70, 74 (1955) (dismissing certiorari as improvidently granted, the Court stated: "this Court does not sit to satisfy a scholarly interest in such [abstract] issues").

A. Petitioners Seek Review of an Interlocutory Order

In *Lindsey*, the Sixth Circuit determined that the District Court has subject matter jurisdiction over the Opt-Out Actions and that transfer of the actions pending against the Non-Debtors under 28 U.S.C. § 157(b)(5) is permissible. *Lindsey*, 86 F.3d at 497; *accord A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986). The matter was then remanded to the District Court and thereafter the Abstention Order was entered.

---

[8] As of November 19, 1996, the appeal was fully briefed. Respondents have not been notified of the date for oral argument.

Initially, the *Lindsey* decision is an interlocutory order that is not reviewable at this time. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967) (certiorari denied because the Court of Appeals remanded the case so the matter was not ripe for review by the Supreme Court). In general, the Court does not exercise certiorari jurisdiction prior to a lower court issuance of a final judgment. *See Virginia Military Institute v. United States*, 508 U.S. 946 (1993); *American Constr. Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372 (1893). In *American Constr.*, Justice Gray noted:

> Whether an interlocutory order may be separately reviewed by an appellate court in the progress of the suit, or only after and together with the final decree, is matter of procedure rather than of substantial right; and many orders made in the progress of a suit become quite unimportant by reason of the final result or of intervening matters. Clearly, therefore, this court should not issue a writ of certiorari to review a decree . . . unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

Id. at 384; *see also Hamilton Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree.") (citation omitted).

B. The Issues Raised in the Petitions Are Not Ripe

Certiorari is not appropriate because the issues sought to be reviewed are not ripe. As one Circuit Court has noted:

> [the] [r]ipeness doctrine is drawn from both Article III limitations on judicial power and discretionary reasons of policy for refusing to exercise existing power. The central concern of both power and discretion is that the tendered case involves uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all.

Metzenbaum v. FERC, 675 F.2d 1282, 1289-90 (D.C. Cir. 1982) (quoting from C. Wright, A. Miller & E. Cooper, 13 *Federal Practice and Procedure: Jurisdiction* § 3532, at 237-38 (1975)).

Whether a decision is ripe for adjudication is "peculiarly a question of timing." *Anderson v. Green*, ___ U.S. ___, 115 S. Ct. 1059, 1060 (1995), *quoting Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974). Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all. *See Dames & Moore v. Regan*, 453 U.S. 654, 689 (1981). Underlying the ripeness doctrine is the concept that courts should decide only a "real, substantial controversy", not a mere hypothetical question. *See City Communications, Inc. v. City of Detroit*, 888 F.2d 1081, 1089 (6th Cir. 1989) (citation omitted).

In this case, the Abstention Order vitiated, at least for the time being, any practical effect of the determination in *Lindsey* that Petitioners seek to have this Court review. The issues raised in the Petitions ceased to be ripe when the District Court abstained and will only become ripe again if the Sixth Circuit reverses the Abstention Order and a final order is entered granting the Transfer Motion—future contingencies that may not occur. Accordingly, the issues raised by Petitioners are presently not ripe for adjudication.

C. Should the Sixth Circuit not Reverse the Abstention Order, the Issues Raised by Petitioners Are Moot

If the Sixth Circuit were to affirm the Abstention Order (or alternatively dismiss the appeals), the issues raised by the Petitioners would be moot. A moot controversy is one "when the issues presented are no longer 'live' or the parties lack a cognizable interest in the outcome." *See Powell v. McCormack*, 395 U.S. 486, 496 (1969) (citation omitted). A moot case is not a "case or controversy" under Article III of the Constitution. *St. Pierre v. U.S.*, 319 U.S. 41, 42 (1943) ("a

federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of litigants in the case before it"); *see also Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990); *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983); *Defunis v. Odegaard*, 416 U.S. 312, 319 (1974); *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

Because a moot controversy does not contain "live" issues, review will result in the issuance of an advisory opinion in contravention of Article III of the Constitution. *See Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Hayburn's Case*, 2 Dall. 409 (1792). The limited exception to the mootness rule for cases that fall under the doctrine of "capable of repetition, yet evading review" is inapplicable in this case. *See Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

Although the O'Quinn Claimants purport that this exception is applicable to the instant case, it is not. O'Quinn Claimants Pet. at 2-3. In order for an action "to be capable of repetition, yet evading review", two elements must be satisfied: (i) the challenged action must be in its duration too short to be fully litigated prior to its cessation or expiration, and (ii) there must be a reasonable expectation that the same complaining party will be subjected to the same action again. *See Weinstein v. Bradford*, 423 U.S. 147, 149 (1975); *see also Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). Assuming, *arguendo*, that the issues raised by Petitioners are "capable of repetition", they most certainly do not evade review.[9] For example, if the Sixth Circuit were to

---

[9] In cases where the Court has invoked the "capable of repetition yet evading review" exception, the matter sought to be reviewed was of a limited duration. *See, e.g., Sosna v. Iowa*, 419 U.S. 393 (1975) (residency requirements); *Super Tire Engineering Corp. v. McCorkle*, 416 U.S. 115 (1974) (economic strikes); *Roe v. Wade*, 410 U.S. 113 (1973) (pregnancy); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (elections).

reverse and the Opt-Out Actions were to be transferred, the issues would no longer be moot and the Court could consider petitions for a writ of certiorari in the normal course. Similarly, if the same parties were to be subjected to this treatment again, it would be in the context of the transfer of the Opt-Out Actions which would not be of such a limited duration so as to avoid review.[10]

In sum, the issues raised by the Petitioners are not presently justiciable and certiorari should be denied.

II.

The Decision in *Lindsey* Would Be The Same Under Any Of The Tests For Determining "Related to" Jurisdiction

Even if the Court were to consider the issues raised in the petitions in the context of a final decision, certiorari should still be denied. Contrary to Petitioners' assertions, the decision in *Lindsey* is not in conflict with *Pacor, Inc. v. Higgins*, 743 F.2d 984 (1984) or *In re Fedpak Systems, Inc.*, 80 F.3d 207 (7th Cir. 1996). Indeed, in issuing its ruling, the Sixth Circuit explicitly relied on the test for determining "related to" jurisdiction set forth in *Pacor*.[11]

---

[10] The Tort Committee acknowledges this fact when it improperly characterizes the motives of the Non-Debtors. *See* Tort Committee Petition at 11 (noting that if the Opt-Out Actions were transferred, they would continue for an indefinite period).

[11] Similarly, *Lindsey* does not represent an "enormous destructive change in the American Tort System" or "violate[ ] basic principles allocating tort jurisdiction in our federal system" as the Tort Committee asserts. Tort Committee Pet. at 9. In *A.H. Robins v. Piccinin*, 788 F.2d 994, *cert. denied*, 479 U.S. 876 (1986), the Fourth Circuit considered similar issues and determined that actions pending against non-debtors were subject to transfer to the district where the Robins case was pending. Petitioners do not assert that a conflict among the Circuits exists with respect to the proper interpretation of 28 U.S.C. § 157(b)(5). Accordingly, certiorari is not appropriate as to that issue.

"Related to" jurisdiction stems from Section 1334(b) of Title 28 which provides, in relevant part, that:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

As this Court has previously noted, the scope of "related to" jurisdiction is not defined, but Congress intended it to be broad:

> Congress did not delineate the scope of 'related to'. . . jurisdiction, but its choice of words suggests a grant of some breadth. The jurisdictional grant in § 1334(b) was a distinct departure from the jurisdiction conferred under previous acts, which had been limited to either possession of property by the debtor or consent as a basis for jurisdiction. . . . We agree with the views expressed by the Court of Appeals for the Third Circuit in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (1984), that **'Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected to the bankruptcy estate,' and that the 'related to' language of § 1334(b) must be read to give district courts jurisdiction over more than simple proceedings involving the property of the debtor or the estate.'**

Celotex Corp. v. Edwards, ___ U.S. ___, 115 S. Ct. 1493, 1498-99 (1995) (emphasis supplied).

Petitioners' assertion that *Lindsey* conflicts with *Pacor* is unfounded. Initially, in determining that the District Court had "related to" jurisdiction over the Opt-Out Actions and that such actions were subject to transfer under 28 U.S.C.

§ 157(b)(5), the Sixth Circuit relied explicitly on the test set forth in *Pacor*:

> As stated in [*Pacor*], the "usual articulation of the test for determining whether civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Pacor*, 743 F.2d at 994. An action is "related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *Id.*
>
> * * * *
>
> Our Circuit adopted the *Pacor* test for determining whether a civil proceeding is "related to" a bankruptcy proceeding under Section 1334(b) in *Robinson*, 918 F.2d at 583 . . . . The majority of our sister circuits have likewise adopted the *Pacor* test for "related to" jurisdiction.

Id. at 489 (citations omitted). Virtually every Court of Appeals has embraced the test enunciated in *Pacor*, sometimes with minor modifications.[12]

While *Lindsey* explicitly relied on *Pacor*[13], Petitioners seem to take issue because of the difference in the holdings of these two cases. Initially, to the extent that Petitioners seek redress

---

[12] *See In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir. 1991); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1002, (4th Cir.) *cert. denied*, 479 U.S. 876; *In re Wood*, 825 F.2d 90, 93 (5th Cir. 1987); *Robinson v. Michigan Consol. Gas Co.*, 918 F.2d 579, 583-84 (6th Cir. 1990); *In re Dogpatch U.S.A.,Inc.*, 810 F.2d 782, 786 (8th Cir. 1987); *In re Fietz*, 852 F.2d 455, 457 (9th Cir. 1988); *In re Gardner*, 913 F.2d 1515, 1518 (10th Cir. 1990); *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 788 (11th Cir. 1990).

[13] Consistent with *Pacor*, the Sixth Circuit recognized that "related to" jurisdiction is not limitless. *Id.* at 490.

from the Court because they are displeased with the result in *Lindsey*, certiorari jurisdiction should not be exercised for the "the benefit of the particular litigants", but instead for the settlement of [issues] of importance to the public, as distinguished from . . . the parties." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 250 (1969) (Harlan, J. dissenting) (citations omitted); *see also* Sup. Ct. R. 10 ("[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

Moreover, the Tort Committee seems to suggest that a definite finding of liability is required under the *Pacor* test. Tort Committee Pet. at 14. Such a finding is not required:

> A key word in [the] test is "conceivable." Certainty, or even likelihood is not a requirement. Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact on "the debtor's rights, liabilities, options, or freedom of action" or the "handling and administration of the bankrupt estate."

In re Marcus Hook Dev. Park, Inc., 943 F.2d 261, 264 (3d Cir. 1991) (quoting *In re Smith*, 866 F.2d 576 (3d Cir. 1989)) (other citations omitted). Finally, the Sixth Circuit explained the difference in the outcome between *Lindsey* and *Pacor*:

> The potential for Dow Corning's being held liable to the non-debtors in claims for contribution and indemnification, or vice versa, suffices to establish a conceivable impact on the estate in bankruptcy. Claims for indemnification and contribution, whether asserted against or by Dow Corning, obviously would affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as Dow Corning's ability to resolve its liabilities and proceed with reorganization. In addition, we believe there is a qualitative difference between the single suit involved in *Pacor* and the over-

whelming number of cases asserted against Dow Corning and the non-debtor defendants in this case.

Id. at 494. Accordingly, *Lindsey* does not conflict with *Pacor*.

In addition, Petitioners assert that *Lindsey* "significantly diverges" from *In re Fedpak Systems, Inc.*, 80 F.3d 207 (7th Cir. 1996). Tort Committee Pet. at 12. In fact, the result in *Lindsey* would be no different if the test in *Fedpak* were applied.[14]

In *Fedpak*, the debtor Fedpak Systems, Inc. ("Fedpak") was the developer and patent holder on a frozen dessert machine. *Id.* at 209. Shortly after filing for bankruptcy, Fedpak commenced a breach of contract action against Stanley Jones ("Jones"). *Id.* The Fedpak/Jones litigation was subsequently settled on appeal and Fedpak thereafter transferred all of its intellectual property rights in the machines to Polar Express International, Inc. ("Polar Express") in exchange for royalty payments. *Id.* at 210. Years later, at the request of Polar Express, Fedpak filed a motion seeking clarification of the findings of facts and conclusions of law issued by the bankruptcy court in the Fedpak/Jones Litigation.

On appeal, the Seventh Circuit noted that Fedpak did not have standing to request such an order. *Id.* at 212. Additionally, the Court noted that the bankruptcy court lacked jurisdiction to determine the rights of Jones and Polar Express to property outside of the Court's control. *Id.* at 213. In so ruling, the court set forth its test for determining jurisdiction: "[a] case is related to a bankruptcy case when the dispute 'affects the amount of property available for distribution [*i.e.*,

---

[14] Equally unavailing is the assertion of the O'Quinn Claimants that the decision in *Lindsey* conflicts with that of *In re Turner*, 724 F.2d 338 (2d Cir. 1983) and *In re Lemco Gypsum, Inc.*, 910 F.2d 784 (11th Cir. 1990). In *Lemco*, the Eleventh Circuit stated: "[w]e join the majority of the circuits that have adopted the *Pacor* formulation." *Id.* at 788. Moreover, the Opt-Out Actions have a "significant connection" with the Debtor's bankruptcy as required under *Turner*. *Turner*, *supra*, 724 F.2d at 341.

the debtor's estate] or the allocation of property among creditors.' " *Id.* at 213-14 (citations omitted).

Despite the Petitioners' assertions to the contrary, the *Fedpak* test does not "significantly diverge" from that of *Lindsey*. Indeed, in the instant case, application of the *Fedpak* test would not have changed the result. Unlike the thousands of claims pending against the Debtor, the claim in *Fedpak* was but a single claim. Moreover, as the Sixth Circuit noted, the claims for indemnification and contribution whether asserted by or against the Debtor will undoubtedly "affect the size of the estate"—*i.e.*, the amount of property available for distribution—as well as the Debtor's "ability to resolve its liabilities and proceed with reorganization"—*i.e.*, allocation of property among creditors. *See Lindsey*, 86 F.3d at 494.

In sum, there is no conflict among the Circuits with respect to "related to" jurisdiction and Petitioners' requests for certiorari should be denied.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

Hayden Smith
Counsel of Record
David J. Adler
McCarter & English
Gateway Four
100 Mulberry Street
Newark, New Jersey 07102
(201) 622-4444
Counsel for Respondents Bristol-Myers Squibb Company and Medical Engineering Corporation

Dated: November 26, 1996

APPENDIX

Appendix "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 95-CV-72397-DT

HON. DENISE PAGE HOOD

In Re:

DOW CORNING CORPORATION,

Debtor.

MEMORANDUM OPINION AND ORDER ON REMAND REGARDING SECTION 1334(c) ABSTENTION

I. *INTRODUCTION*:

This matter is before the Court on remand from the United States Court of Appeals for the Sixth Circuit. *In re: Dow Corning Corporation*, Nos. 95-2034/2082/2084/2106/2107, 86 F.3d 482 (6th Cir. 1996) (Amended). This Court previously entered an order finding that it did not have subject matter jurisdiction over the tort claims against the nondebtor defendants pursuant to 28 U.S.C. § 157(b)(5). The Sixth Circuit reversed this Court's determination on this issue and found that this Court had subject matter jurisdiction over the tort claims pending against the nondebtor defendants pursuant to 28 U.S.C. § 157(b)(5). The Sixth Circuit remanded this case

on the issue of whether or not this Court should abstain from the tort claims against the nondebtors pursuant to 28 U.S.C. § 1334(c)(1) and/or (2).

II. *ANALYSIS*:

A. *Whether this Court must abstain or, alternatively, exercise its discretion to abstain pursuant to 28 U.S.C. § 1334(c).*

1. *Mandatory Abstention.*

The Sixth Circuit has concluded that this Court has "related to" jurisdiction pursuant to 28 U.S.C. § 1334(b) over the actions pending against the nondebtors Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter and Bristol-Myers Squibb in nonbankruptcy forums nationwide. *In re Dow Corning Corp., supra* at 494. In a section 157(b)(5) motion, an abstention analysis is required. *In re Pan American Corp.*, 950 F.2d, 839, 844 (2nd Cir. 1991); *In re Dow Corning Corp., supra* at 497. The Tort Claimants' briefs and other claimants' objections and responses to the nondebtors' motions under Section 157(b)(5) requested this Court to abstain under 28 U.S.C. § 1334(c).

Section 1334(c) qualifies Section 1334(b)'s broad grant of jurisdiction. *In re Dow Corning Corp.* at 497. There are two types of abstention under Section 1334(c): discretionary abstention under 28 U.S.C. § 1334(c)(1) and mandatory abstention under 28 U.S.C. § 1334(c)(2). *Id.* Mandatary abstention will be addressed first.

In order for mandatory abstention to apply, a proceeding must: 1) be based on a state law claim or cause of action; 2) lack a federal jurisdictional basis absent the bankruptcy; 3) be commenced in a state forum of appropriate jurisdiction; 4) be capable of timely adjudication; and 5) be a non-core proceeding. *Id.*

As to the first factor, the claims and causes of action at issue against the nondebtors are personal injury tort claims

which are essentially state law claims. Addressing the second factor, this Court notes that the Sixth Circuit held that this Court has "related to" bankruptcy jurisdiction over the non-debtors. The personal injury tort actions against the non-debtors are not proceedings which need a determination under the bankruptcy laws and do not arise in a bankruptcy case. Absent the bankruptcy of the debtor in this matter, this Court would lack federal jurisdiction over the actions against the nondebtors.[1] With respect to the third factor, there have been no allegations that the actions against the nondebtors have not been commenced in a state forum of appropriate jurisdiction. Satisfying the fourth factor, the parties have informed the Court that there are numerous cases ready for trial against the nondebtors. Furthermore, the Honorable Sam C. Pointer, Jr. in his March 19, 1996 (Order 29) and April 16, 1996 (Order 29B) orders and the Multidistrict Litigation Panel's April 10, 1996 Conditional Remand Order, indicate there are numerous cases against the nondebtors which are indeed ready for trial.

Considering the fifth factor, the Court must determine whether the actions against the nondebtors are non-core proceedings. There are two categories of core proceedings: proceedings "arising under" title 11 and proceedings "arising in" title 11. *In re Harris Pine Mills*, 44 F.3d 1431, 1435 (9th Cir. 1995), *cert. denied*, 115 S.Ct. 2555 (1995). Proceedings "arising under" title 11 "involve a cause of action created or determined by a statutory provision of title 11." *Id.* Proceedings "arising in" title 11 are a reference to those "administrative"

---

[1] The only cases against the nondebtors over which this Court would have jurisdiction, sitting in the Eastern District of Michigan, are those cases that involve complete diversity. The Court notes that most of the cases involving the nondebtors also include the Debtor Dow corning Corporation which would defeat this Court's diversity jurisdiction. (*See* the Court's Discretionary Abstention analysis, *infra*.) The Court notes that mandatory abstention also apply to removed cases. *William v. Shell Oil Co.*, 169 B.R. 684, 690-691 (S.D. Cal. 1994). The Court further notes that absent the bankruptcy, the Court has no jurisdiction over the cases against the nondebtors where the claims arose outside of the Eastern District of Michigan.

matters that arise only in bankruptcy cases and are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy.] *Id.* Section 157(b)(2) provides a nonexclusive list of proceedings which are core proceedings. Non-core proceedings are only "related to" a case under title 11. *Id.* at 1435. A Non-core proceeding "does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy." *Id.*

Personal injury tort or wrongful death claims are excluded from the catalog of core proceedings by 28 U.S.C. § 157(b)(2)(B) and (O) which state in pertinent part:

> (b)(2) Core proceedings include, but are not limited to—
>
> * * *
>
> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12 or 13 of title 11 *but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11*;
>
> * * *
>
> (O) other proceedings affecting the liquidation of assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, *except personal injury tort or wrongful death claims*.

28 U.S.C. § 157(b)(2)(B) and (O) (emphasis added). *In re Hughes*, 98 B.R. 115, 118 (D.C. 1988). The actions against the nondebtor defendants are non-core proceedings under 28 U.S.C. § 157.

Section 157(b)(4) provides that "[n]on-core proceedings under § 157(b)(2)(B) of title 28 [liquidation of personal injury tort or wrongful death cases], shall *not* be subject to the mandatory abstention provisions of Section 1334(c)(2)." *In re Pan Am*, 950 F.2d at 845; 28 U.S.C. § 157(b)(4). As indicated above, the non-core proceedings included in Section 157(b)(2)(B) are "liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims *against the estate* for purposes of distribution in a case under title 11." (Emphasis added). Here, the personal injury and/or wrongful death tort actions are *not* "against the estate" of the debtor but against the nondebtors. Consequently, the non-core proceedings and actions against the nondebtors are *not* exempt from mandatory abstention under Section 157(b)(4). Moreover, 28 U.S.C. § 1334(c)(2) provides for mandatory abstention in cases involving state law claims for which the sole basis of bankruptcy jurisdiction is "related to" jurisdiction. *Celotex Corp. v. Edwards*, 115 S.Ct. 1493, 1506, note 10 (1995) (Stevens, J., dissenting). In the instant case, the Sixth Circuit held that this Court had Section 1334(b) or "related to" jurisdiction over the actions pending against the nondebtors in nonbankruptcy forums nationwide. *In re Dow Corning*, *supra* at 494. Based on the above, the court finds that the four factors calling for mandatory exemption under Section 1334(c)(2) have been met.

2. *Discretionary Abstention.*

Alternatively, the Court exercises its discretion to remand pursuant to 28 U.S.C. § 1334(c)(1). Section 1334(c)(1) provides:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

In *In re White Motor Credit*, 761 F.2d 270 (1985), the Sixth Circuit noted:

> . . . federal courts should be hesitant to exercise jurisdiction when state issues substantially predominate, whether in terms of proof of the scope of the issues raised, or of the comprehensiveness of the remedy sought.

Id. at 274 (quotations omitted). Here, the personal injury/tort claims against the nondebtors are predominantly state law claims. The proof and scope of issues in dispute and the comprehensiveness of the remedies sought varies state to state. The Sixth Circuit in *In re White Motor* further noted that:

> . . .in large bankruptcy cases with hundreds or even thousands of tort litigants beating on the door of one federal judge, . . . at least judicial economy and expeditiousness, may depend on the court's authority to refer cases to other courts. Since the 1984 Bankruptcy Act prevents reference of these tort cases to bankruptcy courts, as in the past, it makes good sense to give the district courts wide latitude in referring the cases through abstention to other courts.

Id. The Court finds that discretionary abstention from the cases against the nondebtors would best serve the interest of justice and comity. Waiting until the estimation and confirmation of a plan of reorganization before the actions against the nondebtors are liquidated would not result in a more precise estimation of the assets needed by the debtor's estate to cover any indemnification and contribution claims against the debtor's estate. The estimation of any possible indemnification and contribution claims by the nondebtors against the debtor's bankruptcy estate would not be any different than if the cases against the nondebtors proceed to trial at this stage. To the contrary, as the various trials proceed against the nondebtors, a clearer picture would emerge as to whether the non-

debtors would have any indemnification or contribution claims against the debtor's estate.

The Sixth Circuit opinion addresses the Joint Insurance issue between Dow Corning, Dow Chemical and Corning Incorporated finding that the Court had "related to" jurisdiction based on the Joint Insurance between the parties. The Sixth Circuit opinion does not address the Joint Insurance issue as it pertains to the abstention issue. This Court addresses this issue as it relates to the interest of justice and comity issues which must be addressed in an analysis of discretionary abstention. Although Dow Chemical has apparently notified insurers that it is asserting claims against the jointly-held policies, it has been argued that as to Dow Chemical, the joint policies are in fact excess policies and that Dow Chemical has sufficient primary insurance. (Ex. A, p.5, Official Committee of Tort Claimants' Brief, filed June 7, 1996). The Sixth Circuit's opinion addresses the insurance issue from the point of view of whether the Debtor's estate will have sufficient resources. The Debtor itself has not put forth proof that its estate would be dissipated based upon the "threat" posed to those insurance policies by Dow Chemical and Corning Incorporated. In *The Matter of Zale Corp.*, 62 F.3d 746 (5th Cir. 1995), the Fifth Circuit found that even if the bankruptcy court had "related to" jurisdiction over certain insurance policies with indemnification contracts, a nondebtor should not be shielded by the powers of the bankruptcy court. *Id.* at 760-761. The Bankruptcy Code discharges the Debtor's liabilities and not those owed by third parties. *Id.* at 760, notes 42, 43 and 44; 11 U.S.C. §524(e). If the Court does aid abstain from the tort claims against the nondebtors, the tort claims against the nondebtors would effectively be determined by this Court which would be contrary to 11 U.S.C. §524(e). Section 524(e) does not allow the Bankruptcy Code to be used to discharge the debts of nondebtors. *Id.*, at 760, notes 42, 43 and 44. The Court finds that the "threat" posed to the insurance policies by the nondebtors does not overcome factors in favor of discretionary abstention. Specifically, the Court finds the inter-

ests of justice and comity weigh in favor of discretionary abstention.

III. *CONCLUSION*:

This court finds that the cases against the nondebtors are subject to mandatory abstention under 28 U.S.C. § 1334(c)(2). Alternatively, the Court finds that in the interest of justice, comity and judicial economy, it will exercise its discretion to abstain from the cases against the nondebtors under 28 U.S.C. § 1334(c)(1)

Accordingly,

IT IS ORDERED that the actions against the nondebtor defendants are subject to mandatory abstention under 28 U.S.C. § 1334(c)(2); alternatively,

IT IS ORDERED that the Court will exercise its discretion to ABSTAIN from the cases against the nondebtors under 28 U.S.C. § 1334(c)(1).

/s/ _____
DENISE PAGE HOOD
United States District Judge

DATED: Jul 30, 1996

Appendix "B"

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 96-2005/2008/2009/2010/2011/2012/2013

HEIDI LINDSEY, Rep. of Charlotte Mahum and Cheryl Kahn, et al.,

Plaintiff,

TORT CLAIMANT, Official Committee of Tort Claimants; et al,

Plaintiff-Appellees,

—v.—

O'BRIEN, TANSKI, TANZER AND YOUNG HEALTHCARE PROVIDERS OF CONNECTICUT; et al,

Defendants,

DOW CORNING CORPORATION (96-2009); THE DOW CHEMICAL COMPANY (96-2005); BAXTER INTERNATIONAL INCORPORATED (96-2011); MINNESOTA MINING AND MANUFACTURING COMPANY (96-2010); BRISTOL-MYERS SQUIBB COMPANY (96-2013); and MEDICAL ENGINEERING CORPORATION (96-2012),

Defendant-Appellant.

Before: MARTIN and BATCHELDER, *Circuit Judges*; and WISEMAN, *District Judge*.*

ORDER

These appeals are from the district court's memorandum opinion and order regarding abstention pursuant to this court's remand. The Official Committee of Tort Claimants moves to dismiss the appeals, and the various appellants respond in opposition. The jurisdictional issue shall be argued along with the merits of the appeals.

It is ORDERED that the clerk enter an expedited briefing schedule in this matter. Upon completion of briefing, the cases shall be submitted for argument upon the briefs and the motion to dismiss.

ENTERED BY ORDER OF THE COURT

/s/
Clerk

---

* The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

No. 96-330

Supreme Court, U.S.
FILED
DEC 9 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

OFFICIAL COMMITTEE OF TORT CLAIMANTS,

Petitioner,

—v.—

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, CORNING INCORPORATED, BAXTER INTERNATIONAL INCORPORATED, MINNESOTA MINING AND MANUFACTURING COMPANY, BRISTOL-MYERS SQUIBB COMPANY AND MEDICAL ENGINEERING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

MARVIN E. FRANKEL
(Counsel of Record)
Kenneth H. Eckstein
Jeffrey S. Trachtman
Kramer, Levin, Naftalis
& Frankel
919 Third Avenue
New York, New York 10022
(212) 715-9100

Attorneys for the Official Committee of Tort Claimants

15 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

1. The Sixth Circuit's Jurisdictional Ruling Presents a Justiciable Controversy 1

2. The Unprecedented Expansion of Bankruptcy Jurisdiction Represented by the Sixth Circuit's Decision Warrants Review by This Court 3

3. Respondents' Arguments About the Supposed Need for Transfer are Misleading and Irrelevant . 6

4. Section 157(b)(5) Was Never Intended to Effect Mass Transfer of Nondebtor Litigation 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases: **Page**

A.H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986) . . 6 n.4, 9

In re Amatex Corp., 110 B.R. 168 (Bankr. E.D. Pa. 1990) 8

Board of Pardons v. Allen, 482 U.S. 369 (1987) 3

Brenes v. United States Lines, Inc. (In re United States Lines, Inc.), 128 B.R. 339 (S.D.N.Y. 1991) 8 n.6

Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968) 2

Celotex Corp. v. Edwards, 115 S. Ct. 1493 (1995) 4, 5 n.2

In re Fedpak Sys., Inc., 80 F.3d 207 (7th Cir. 1996) . . 4

Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) 2

In re G.S.F. Corp., 938 F.2d 1467 (1st Cir. 1991) . . . 5

Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) 3

Hickman v. Taylor, 329 U.S. 495 (1947) 3

Home Ins Co. v. Cooper & Cooper, Ltd., 889 F.2d 746 (7th Cir. 1989) 5

Page

In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 893 (E. & S.D.N.Y. 1991) 7

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 3

Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (In re Dow Corning Corp.), 86 F.3d 482 (6th Cir. 1996) 3

In re Marcus Hook Dev. Park, Inc., 943 F.2d 261 (3d Cir. 1991) 5

Murray v. Pan Am. World Airways, Inc. (In re Pan Am. Corp.), 16 F.3d 513 (2d Cir. 1994) 9

In re Pacor, Inc., 110 B.R. 686 (E.D. Pa. 1990) 8

Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984) 3, 4, 5

Powell v. McCormack, 395 U.S. 486 (1969) 2

Publicker Indus., Inc. v. United States (In re Cuyahoga Equip. Corp.), 980 F.2d 110 (2d Cir. 1992) 5

Wood v. Wood (In re Wood), 825 F.2d 90 (5th Cir. 1987) 5

Page

Statutes:

28 U.S.C. § 157 . . . . . 9 n.6, 9

28 U.S.C. § 157(b)(2) 8

28 U.S.C. § 157(b)(5) 8, 8 n.6, 10

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1334(b) 5

Bankruptcy Code § 502(e)(1)(B) 8

Legislative Materials:

130 Cong. Rec. H7492 (daily ed. June 29, 1984), *reprinted in* 4 *Collier on Bankruptcy* (Appendix) (15th ed. 1996) 10

Other Authorities:

Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* (7th ed. 1993) 2-3

PETITIONER'S REPLY BRIEF

The filing of four briefs opposing certiorari, totalling 83 pages, does not diminish the considerations favoring review in this case. The vigor with which respondents defend the Sixth Circuit's decision proves that jurisdiction is hardly a dead issue. Nor have respondents shown that the case lacks public importance. The parties directly affected number in the thousands, and the scope of bankruptcy jurisdiction is critical to thousands more who are or will be involved in mass tort litigation across the country. The decision is a major development -- the first time a nondebtor mass tort manufacturer defendant has come this close to shutting down litigation against it on the basis that it might someday bring contribution claims against an unrelated corporate co-defendant in chapter 11. There is no warrant for supposing that Congress intended such a result.

1. The Sixth Circuit's Jurisdictional Ruling Presents a Justiciable Controversy

The suggestion that the jurisdictional question presented herein is or may become moot is plainly groundless. Respondents' efforts to resist and overturn the district court's abstention decision are based on the vitality of that jurisdictional ruling; if no federal court jurisdiction existed over the nondebtor claims, it is rather the abstention issues that would be moot. Regardless of how abstention is decided, however, the jurisdiction ruling, if not addressed in this Court, will remain the law of the case and a significant precedent.

A few examples suffice to demonstrate the real and immediate effects of the Sixth Circuit's jurisdiction ruling. In a brief filed in the district court in support of a motion to enlarge their time to file notices of removal, the three non-shareholder nondebtors (3M, Baxter, and Bristol-Myers) argued that the jurisdiction ruling permits them to continue

removing cases to various federal courts regardless of the district court's abstention ruling. Dow Chemical similarly has argued to Judge Pointer that, in view of the jurisdiction ruling, the district court's July 30 abstention ruling does not require the MDL court to remand nondebtor cases to state court. Even if the Sixth Circuit affirms the July 30 abstention decision, there is no reason to conclude that the nondebtor defendants will cease their efforts to keep cases in federal court on the basis of the jurisdiction decision.

The existence of "related to" jurisdiction therefore is still a "live" controversy in which petitioner has a "legally cognizable interest." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Even if, contrary to all indications, affirmance of the abstention ruling caused respondents to abandon their attempts to remove tort claims, the jurisdiction ruling would still govern subsequent proceedings, including any later attempts to revisit abstention or otherwise effect removals of nondebtor claims. A decision with such ongoing effect is surely not moot. *See, e.g., Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 568 (1984); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 177-79 (1968).

Nor is there any question of "ripeness" here. As noted above, respondents are already seeking relief in different courts on the basis of the jurisdiction ruling, even before the Sixth Circuit rules on the abstention appeals.

Finally, respondents' admission (*e.g.*, 3M Br. 9) that 28 U.S.C. § 1254(1) provides this Court with jurisdiction to grant the petition itself contradicts the justiciability argument. There is no finality threshold for this Court's jurisdiction; if the case was properly in the Court of Appeals, this Court may grant certiorari. *See* Robert L. Stern, Eugene

Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* § 2.2, at 40 (7th ed. 1993). The Court has frequently reviewed significant non-final decisions involving federal jurisdiction and procedure, particularly where the issue presented was key to the further conduct of the litigation. *See, e.g., Board of Pardons v. Allen*, 482 U.S. 369, 372 (1987) (due process); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 684-85 (1949) (jurisdiction); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 503 (1947) (*forum non conveniens*); *Hickman v. Taylor*, 329 U.S. 495, 499 (1947) (discovery).

2. The Unprecedented Expansion of Bankruptcy Jurisdiction Represented by the Sixth Circuit's Decision Warrants Review by This Court

Respondents characterize the Sixth Circuit's decision as moderate and unremarkable. Their chief ground for this assertion is the court's facial adherence to the predominant "conceivable impact" test. But as demonstrated (Pet. 13-18), this formulation is an oversimplification and distortion of *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), and its progeny. Investing the word "conceivable" with talismanic and limitless significance, respondents largely ignore *Lindsey*'s central conflict with the actual *holding* of *Pacor*: that the mere possibility of a subsequent contribution claim by a nondebtor defendant arising out of alleged common liability with the debtor does not, without more, confer "related to" jurisdiction. It is that conflict that squarely presents the principal ground petitioner urges for granting the writ here.

Respondents' attempts to harmonize *Pacor* and *Lindsey* are unavailing. If a single contingent contribution claim does not give rise to "related to" jurisdiction, the mere assertion

that many such claims may be made does not create such jurisdiction. Nor is it significant (3M Br. 16) that the debtor in *Pacor* had not been sued by the original plaintiff. An estate's potential contribution liability depends not upon whether the original plaintiff has sued the debtor, but on whether the debtor is in fact jointly liable to that plaintiff and thus subject to a contribution claim if a nondebtor defendant discharges greater than its share of the joint liability. The Debtor's joint liability here for providing silicone gel to be included in a co-defendant's product (or providing a separate implant to the same plaintiff) is conceptually identical to liability for supplying asbestos for a co-defendant's product.[1]

Respondents also seek to distinguish *In re Fedpak Sys., Inc.*, 80 F.3d 207 (7th Cir. 1996), on the ground that the frozen dessert machine at issue in that case was no longer property of the estate. *E.g.*, 3M Br. 17-18. But the issue in *Fedpak* was the potential for claims against the estate -- and the court properly denied "related to" jurisdiction because it found that prospect speculative. *Fedpak* embodies the balanced approach to "related to" jurisdiction that *Pacor* originated, this Court endorsed in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995), and the Sixth Circuit has eschewed.

Respondents cite other cases applying *Pacor* to find "related to" jurisdiction in various circumstances. But none of these cases finds jurisdiction in the situation common to *Pacor* and this case -- an independent corporate tortfeasor with a potential contribution claim -- and none begins to

---

1 3M's repeated insistence that the claims against it and Dow Corning are the "same claim" (Br. 25) also lacks significance. In a sense, all joint tortfeasors are subject to the "same claim" -- but the common rule is that claims against joint tortfeasors proceed even if a co-defendant has entered chapter 11. *See* Pet. 16.

dissipate the conflict petitioner urges. Many of the cases cited by respondents concerned parties entitled to automatic contractual indemnification. *See, e.g., In re G.S.F. Corp.*, 938 F.2d 1467 (1st Cir. 1991); *Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746 (7th Cir. 1989).[2] Other cases, while reciting the *Pacor* standard, are of little relevance here because they involved construction of orders directly affecting property of the estate. *See, e.g., Publicker Indus., Inc. v. United States (In re Cuyahoga Equip. Corp.)*, 980 F.2d 110 (2d Cir. 1992); *In re Marcus Hook Dev. Park, Inc.*, 943 F.2d 261 (3d Cir. 1991).

While some cases have given extremely broad application to *Pacor*, most notably *Wood v. Wood (In re Wood)*, 825 F.2d 90 (5th Cir. 1987), which essentially found "related to" jurisdiction over all claims involving joint tortfeasors, that is precisely what justifies this Court's involvement. The broadest readings of *Pacor*, imputing a literal and unnuanced meaning to "conceivable impact," are unsupported by any suggestion that Congress intended such a sweep for § 1334(b). The result sought here -- mass

---

[2] *Celotex* is in this category. There, permitting a creditor to execute on a surety bond securing a judgment against the debtor would, unlike the tort claims at issue here, have had a direct effect on the debtor because it would have entitled the surety to go after collateral securing the bond. The chain of contingent events discussed in *Celotex* and stressed by respondents (*e.g.*, Dow Br. 11) related to the potential *degree* of impact on the estate -- the fact of *some* impact was beyond dispute.

halting and transfer of litigation involving unrelated joint tortfeasors -- shows that correction of this drift is warranted.[3]

3. Respondents' Arguments About the Supposed Need for Transfer are Misleading and Irrelevant

Respondents suggest (*e.g.*, 3M Br. 23-24; Bristol-Myers Br. 16) that consolidation of the nondebtor tort claims in the bankruptcy forum is necessary to the resolution of the Debtor's bankruptcy. Respondents are vague, however, about the actual practical reasons for consolidation. While Dow seeks a "joint trial" on disease causation, no nondebtor has sought to be included in any joint causation trial proposed as part of the estimation process.

The suggestion that transfer is somehow necessary either to conduct estimation proceedings or to facilitate a settlement is baseless. It is undisputed that estimation and establishment of a claims facility occurred in the A.H. Robins bankruptcy without a single claim ever being transferred.[4] Thus, 3M's

---

[3] Respondents suggest (*e.g.*, Baxter Br. 17-18) that the Sixth Circuit's virtually limitless construction of "related to" jurisdiction is not troubling because Congress provided a powerful abstention provision to avoid overbroad applications of jurisdiction. But respondents fail to inform the Court that they have argued in the Sixth Circuit that the jurisdictional ruling essentially forecloses the district court from applying either mandatory or discretionary abstention to the nondebtor breast implant claims and requires it to order all such claims centralized in the bankruptcy forum.

[4] Petitioner did not, as Dow alleges (Br. 18 n.8), claim that no transfer was ever *ordered* in *Robins*. However, the transfer initially ordered by the district judge was never *effected* because the notice required by the Fourth Circuit was never given to individual plaintiffs. The absence of such transfer did not impede resolution of the bankruptcy. *See* Pet. 21.

argument that transfer is necessary to "deal[ ] with" its potential contribution claims (Br. 23) is groundless. 3M can participate in the estimation proceedings as a contingent creditor. The Debtor will surely deal with any genuine contingencies. Claims against nondebtors need not be transferred, much less liquidated, for the bankruptcy court to estimate the Debtor's exposure to any party.[5]

Moreover, respondents fail to explain how any appreciable number of contribution claims will even find their way into the bankruptcy. While respondents are apparently prepared to submit proofs of claim preserving their theoretical rights as of the bar date, that is a far cry from being willing ultimately to prove in any court that breast implants cause harm -- a necessary element of any contribution claim. *See* Pet. 18.

Even if the nondebtor defendants were willing to make such allegations, contribution claims would not play a major role in the bankruptcy. Most claims resolved in the ordinary course prior to the conclusion of the bankruptcy will settle rather than go to trial, generally barring a contribution claim against non-settling tortfeasors. *See In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 893 (E. & S.D.N.Y. 1991) (42 states bar contribution claims by settling tortfeasors). Only where a nondebtor defendant is held jointly and severally liable after a trial and a plaintiff collects damages

---

[5] Indeed, if estimation is properly conducted, contribution claims are a wash: The question in the estimation will be the Debtor's total liability to all tort plaintiffs. A contribution claim will mature only if part of that liability is discharged by another defendant, shifting the claim from the original plaintiff to the party seeking contribution. The contribution claim does not constitute a separate source of liability for the Debtor.

from that nondebtor attributable to the Debtor's fault would a contribution claim become non-contingent. Few such claims are likely to ripen during the bankruptcy -- and those that remain contingent *must be disallowed* under the express terms of Bankruptcy Code § 502(e)(1)(B). *See, e.g., In re Pacor, Inc.*, 110 B.R. 686, 689-91 (E.D. Pa. 1990); *In re Amatex Corp.*, 110 B.R. 168, 170-73 (Bankr. E.D. Pa. 1990). That presumably is why the Debtor has shown no interest in having claims against 3M, Baxter, and Bristol-Myers transferred to be "dealt with" in the bankruptcy.

4. Section 157(b)(5) Was Never Intended to Effect Mass Transfer of Nondebtor Litigation

Respondents suggest that since § 157(b)(5) does not repeat the language in § 157(b)(2) referring to personal injury claims "against the estate," it must, by logical implication, have been intended to empower the district court to transfer all personal injury claims against any defendant. But if Congress had meant to create such a sweeping and novel power over nondebtor litigation, it would likely have done so expressly and not by negative implication in a statute otherwise devoted to dividing up business within the bankruptcy between the district and bankruptcy courts.[6]

Respondents' central argument for their broad reading of § 157(b)(5) is the supposed Congressional policy mandating

---

[6] Contrary to Dow's suggestion (Br. 17 n.7), *Brenes v. United States Lines, Inc. (In re United States Lines, Inc.)*, 128 B.R. 339, 341 (S.D.N.Y. 1991), does observe that § 157(b)(5) is mainly concerned with "which court, as between the bankruptcy court and the district court, should hear personal injury claims against the debtor." This point is pertinent whether or not the district court has power to remove cases from state court -- an issue that has nothing to do with the application of § 157 to claims against nondebtors.

total centralization of all conceivably "related to" litigation in the bankruptcy forum. While the Sixth Circuit claims to have located such a policy, Congress has never expressed it. The Circuit relied for this point on two cases -- *A. H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986), which as noted (Pet. 21-22) focused its analysis almost entirely on claims against the debtor and in any event involved only a single product and manufacturer, and *Murray v. Pan Am. World Airways, Inc. (In re Pan Am. Corp.)*, 16 F.3d 513 (2d Cir. 1994), which itself concerned only claims against Pan Am and its affiliates.

The legislative history underlying *Robins* and *Pan Am.* does not reflect that Congress gave any consideration to nondebtor claims in expressing a policy towards centralization of bankruptcy proceedings. For example, Rep. Robert Kastenmeier's oft-quoted statement that the purpose of § 157 was to avoid "creating a multiplicity of forums for adjudication of parts of a bankruptcy case" actually had nothing to do with transferring claims against nondebtors:

> The House-passed bill contained a definition of what a bankruptcy judge could properly do. The Senate bill adopted a largely similar view with one exception. Under the Senate-passed bill, bankruptcy judges could not hear unliquidated claims. The Senate approach would have repudiated decades of bankruptcy law and practice. The change in the definition in the Senate-passed bill would have contradicted the basic purposes of the consolidated jurisdiction we adopted in 1978 in response to the recommendations of the Commission on Bankruptcy Laws. Finally, it would have dissipated the assets of the estate by creating a multiplicity of forums for the adjudication of parts of a bankruptcy case.

130 Cong. Rec. H7492 (daily ed. June 29, 1984) (citation omitted), *reprinted in* 4 *Collier on Bankruptcy* (Appendix) XX-18 through XX-19 (15th ed. 1996).

In context, it is clear that Rep. Kastenmeier was concerned only about preserving centralized liquidation of *claims against the estate*. With due respect to the courts that have assigned the language broader meaning, it hardly establishes that this venue-setting provision was intended to create broad new powers to transfer *nondebtor* cases. It thus appears that the Sixth Circuit has magnified and broadened the tendency in some courts to read into § 157(b)(5) a power never intended by Congress, a sound reason for review by this Court.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

Marvin E. Frankel
(Counsel of Record)
Kenneth H. Eckstein
Jeffrey S. Trachtman
Kramer, Levin, Naftalis & Frankel
919 Third Avenue
New York, New York 10022
(212) 715-9100
Attorneys for the Official Committee
of Tort Claimants

December 1996